IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1371

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Petitioner,

v.

GREAT COASTAL EXPRESS, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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OPINIONS BELOW

The opinion of the District Court denying defendant's motion for judgment notwithstanding the verdict and for a new trial, but granting a partial new trial is reported at 350 F.Supp. 1377. It is reproduced at pp. 1a-11a of the separately bound Appendix to this petition (hereafter "App."). The opinion of the Court of Appeals is reported at 511 F.2d 839 and is reproduced at App. 16a-31a. The opinion of the Court of

Appeals denying rehearing is not reported and is reproduced at App. 33a-34a.

JURISDICTION

The judgment of the Court of Appeals was entered on January 21, 1975 (App. 32a). A timely Petition for Rehearing was denied on November 14, 1975 (App. 33a-34a). On January 15, 1976 and March 12, 1976, Mr. Chief Justice Burger entered orders extending the time for filing this Petition to March 25, 1976. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Under Rule 59(a) of the Federal Rules of Civil Procedure, which codifies the decision in *Gasoline Products Co.* v. *Champlin Refining Co.*, 283 U.S. 494, may a District Court grant a partial new trial limited to damages only, after a general verdict in a jury trial, where:

a) the Court has determined that the jury, despite his instructions, was influenced by evidence of "gross and vicious conduct" not attributable to the defendant, and thereupon returned a verdict far in excess of what the evidence permitted and what the plaintiff claimed; and

b) the evidence before the first jury showed that the defendant had engaged in some lawful strike activity against the plaintiff, and in several other incidents of strike activity, of which the jury could have found one or more to be unlawful, and the plaintiff is entitled to recover only for damages proximately caused by unlawful activity (*Teamsters Union* v. *Morton*, 377 U.S. 252)?

2. In a suit under § 303 of the Labor-Management Relations Act where the defendant union has engaged in some lawful strike activity against the plaintiff, and some activity which violates § 8(b)(4) of the Act, does not the plaintiff have the burden of proving that its strike losses were proximately caused by unlawful activity? In such a suit, may a plaintiff recover any damages where it fails to establish that any of its strike losses were proximately caused by unlawful activity?

STATUTE AND RULE INVOLVED

This case involves §§ 8(b)(4)(B) and 303 of the Labor-Management Relations Act of 1947, as amended, 61 Stat. 136, 73 Stat. 519, 29 U.S.C. § 158(b)(4) and § 187. It also involves Rule 59(a) of the Federal Rules of Civil Procedure. These provisions are set forth in Appendix B of this Petition, p. 1b, *infra*.

STATEMENT OF THE CASE *

A. The District Court

1. *The Complaint and the Liability Trial.*

Petitioner International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (hereinafter "IBT" or "the International") is a labor organization with local affiliates in the United States and Canada. Respondent Great Coastal Express, Inc. (hereinafter "Great Coastal") is an interstate freight trucking corporation, covered by the Act.

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* References to I JA are to the first volume of the Joint Appendix (first trial); references to II JA are to the second volume of the Joint Appendix (second trial); and references to III JA are to the third volume of the Joint Appendix (additional exhibits from both trials). Tr. refers to the transcript not reproduced in the Joint Appendix.

Great Coastal originally brought this action in December, 1970 in the Law and Equity Court of the City of Richmond, Virginia, seeking compensatory and punitive damages for violence and illegal secondary boycott activity which allegedly occurred during a strike conducted by Local 592 of the IBT. Great Coastal named only the IBT as a defendant. The IBT, invoking federal jurisdiction pursuant to §§ 301 and 303 of the Act, removed the action to the United States District Court for the Eastern District of Virginia.

The case was tried to a jury in June, 1972. The evidence showed the following:

Great Coastal's collective bargaining agreements with drivers and other employees represented by local affiliates of the International expired on March 31, 1970 (I JA 108). Negotiations between Great Coastal and Teamsters Local 592 failed to result in agreement (I JA 123, 372), and on August 9, 1970 a strike began in Richmond, which soon spread to Great Coastal's other terminals in Philadelphia and New Jersey (I JA 122-123). Great Coastal continued to operate trucks throughout the strike using office employees, salesmen and newly hired replacement drivers (I JA 123). In mid-August the president of Local 592 sent letters to Great Coastal's customers announcing the strike and advising them that Local 592 would follow the Great Coastal trucks and would picket the Great Coastal employees while they were making deliveries on the customers' premises, in accordance with the standards established by the Labor Board "in a series of cases beginning with *Moore Dry Dock Co.*, 92 NLRB 547" (III JA 937).

In addition to picketing at Great Coastal's terminals, Local 592 utilized roving pickets who attempted to follow Great Coastal's trucks and to set up picket lines at their destinations (I JA 126). The pickets were given written instructions to confine their picketing to the times when Great Coastal equipment and employees were on a customer's premises, to picket as close to the trucks as possible, and to respect the customers' wishes with regard to picketing on their property. The pickets were also instructed to speak to no one while picketing and carried signs stating clearly that the local's dispute was solely with Great Coastal (III JA 959-961).

The pickets were further instructed that prior to establishing a picket line on or near the property of a Great Coastal customer, they were to approach the top available managerial person, hand him a copy of the letter to customers, and request that he refuse to load or unload the Great Coastal truck, or alternatively that he allow them to picket the truck directly on the property of the customer. If such permission was denied, the pickets were instructed to establish their line on public property as physically close to the Great Coastal truck as possible (I JA 388-390). There was little testimony with respect to any activity at the premises of Great Coastal's customers. The only testimony from which a jury could possibly find specific instances of secondary boycott activity was limited to eight incidents over the eight months of the strike. These incidents are described in Appendix C to this Petition, pp. 1c to 3c, *infra*. As a reading of Appendix C will show, even as to those eight incidents, the evidence was both slight and equivocal.

There was other general testimony to the effect that customers of Great Coastal refused to accept shipments during the strike (I JA 238-251, 262-263, 371, 328). However, that testimony dealt only with the fact that shipments were refused. There was no evidence from which the reason for such refusal could be determined, let alone any evidence that it was due to unlawful secondary boycott activity.

The bulk of plaintiff's presentation was devoted to tales of violence including death threats (I JA 199); threats of physical harm (*e.g.,* I JA 200, 202, 206, 209, 347); bodily assault (*e.g.,* I JA 202); gunshots (*e.g.,* I JA 211-212, 223, 286, 353); deliberate vehicular collisions (*e.g.,* I JA 204, 212, 302, 344); and other physical damage to vehicles (*e.g.,* I JA 221, 324, 347, 356).

The evidence with respect to International authorization, ratification or participation in strike activities established that it had supplied strike benefits of up to $25 per week to individual strikers, that it had provided $10,000 to the depleted treasury of Local 592, and that one of its vice-presidents had solicited its other, non-involved affiliates to provide "any assistance you can legally give" to the striking locals (I JA 387, 392; II JA 542).

Great Coastal's only witness on the issue of damages was accountant John Lepp. He testified that he had examined the books of Great Coastal Express for the periods preceding, during and after the strike. Beginning in August, 1970, when the strike started, he noted a disruption in the company's general pattern of receipts and profits. On the basis of the company's business growth pattern and operating ratio over a period of time prior to the strike, Mr. Lepp projected a figure for anticiated profit during the period of the strike of

$322,438. He added to this figure the actual loss suffered by the company during the period of the strike, $274,895, to reach a total damage figure of $597,333. He then computed a projected profit figure of $495,715 for the period from the end of the strike to the end of 1971, again using pre-strike growth patterns and operating ratios. He subtracted from this figure the smaller profit which the company actually showed in the immediate post-strike period, and came up with an additional figure of $344,732. He added this to the $579,333 to reach his total damage estimate of $942,065 (I JA 118-151).

Lepp testified on cross-examination that these damages were attributable to the strike generally and that he did not know what portion of this loss was attributable to lawful strike activity and how much could be ascribed to any unlawful activities (I JA 152-153).

2. *The Court's Directed Verdict on Violence, the Jury's $1,300,000 Verdict, and the Court's Ruling Thereon.*

At the conclusion of the plaintiff's case, the trial court granted a motion for a directed verdict with respect to strike violence holding that as a matter of law plaintiff had the burden "to prove [that portion of its] case by clear, convincing evidence" as required by § 6 of the Norris-LaGuardia Act, and had failed to "sustain that proof" (I JA 384). While the court expressed "serious doubts that the plaintiff had shown that the International [was] liable for the alleged secondary boycott actions" or "that the plaintiff has shown with the degree of proof * * * required * * *, the damages flowing from the alleged secondary boycott actions" it allowed the case to go forward on those issues (I JA 384-385).

The case was submitted to the jury on plaintiff's claim that it had sustained actual damages of $942,065 in unrealized profits during and as a consequence of the strike (I JA 452). The Judge instructed the jury:

> "Now, * * * you will recall there was testimony * * *, during the course of several days, in reference to certain acts of violence which, as despicable as they may well have been, are not to be considered by you in reference to any damages which you may ultimately award in this case because as a matter of law the Court has ruled that the only issue to be determined by this jury has to do with the secondary boycotting which I will discuss further." (I JA 457).

The jury returned a general verdict against the International of $1,300,000 (I JA 486-487).

The International filed a motion for judgment notwithstanding the verdict or for a new trial, raising among other issues, manifest jury prejudice by reason of the admission of evidence of strike violence and the insufficiency of proof of agency by which the International could be held liable for acts of its members and/or local affiliates. On November 22, 1972, the court by memorandum opinion, decided that the evidence was sufficient to go to the jury on the issue of the International's responsibility (App. 4a-5a), and that its instructions to the jury for determining whether conduct which violated §8(b)(4) were correct (*id.* 7a-10a). However, the Court was "of the further opinion that the jury * * * was in spite of the Court's instructions to the contra influenced in its consideration of damages by the gross and vicious conduct attributed to the members of the local union and their sympathizers. This is reflected in its verdict which exceeded even the

claims of plaintiff's persuasive advocate by more than $300,000." The court concluded that the "appropriate remedy" was "a remand for new jury determination as to damages" and denied all other relief. (App. 6a-7a).

3. *The Damage Retrial.*

Great Coastal's principal witness on damages was again accountant John Lepp, who testified that he had examined the books of the company for periods preceding, during and after the strike, and assuming an established growth factor, had calculated loss of profits of $942,065. (II JA 828-834). However, he made no attempt to relate any of this loss to illegal activity. This was acknowledged after cross-examination;

> "Q. During the periods that you had under study, there was a certain reduction in the revenue of Great Coastal?
> A. Yes sir.
> Q. Now, for all you know, that reduction could have been caused by lawful strike activity, could it not? You didn't make a study to determine the cause of these losses, did you?
> A. No sir." (II JA 846).

Mr. Lepp was also unable to link any loss of revenue to unlawful activity:

> "Q. But you don't know whether it was caused by lawful activity on the part of the union or unlawful activity or simply because a customer became disenchanted with Great Coastal?
> A. I know it was caused by the strike.
> Q. That is all you know?
> A. Right. It was caused by the strike." (II JA 847).

Charles Edwin Estes, president of Great Coastal, over objection, was permitted to state his opinion as to why business was lost (II JA 720). No foundation was laid for the expression of his opinion, and the trial court expressly acknowledged its incompetence by instructing the jury to disregard it (II JA 916).

At the conclusion of Great Coastal's case, the International moved for a directed verdict based primarily upon Great Coastal's failure to offer any evidence to establish damages flowing from illegal activities as differentiated from its overall strike loss. The trial court, while admitting doubt, denied the motion "to see what happens with [the] jury" (II JA 910). Over objection (II Tr. 343-345, 348, 370-373), the Court instructed the jury:

> "And the Court tells you that in that [prior] trial it was found that by following the plaintiff's trucks and picketing at the premises of certain of the plaintiff's customers, an object of the defendant union was to induce employees of certain of the plaintiff's customers to refuse to handle the plaintiff's freight. It was found that these actions of the defendant union did, in fact, cause the employees of certain of the plaintiff's customers to refuse to handle the plaintiff's freight, and that losses were suffered by the plaintiff by reason of its inability to move its freight and were caused by such unlawful secondary boycotting activities of the defendant union.
>
> "So I tell you now, that has been established. * * * There isn't any argument about it, that the defendant union overstepped its bounds, so to speak, and permitted illegal acts for which they are liable in damages, providing, the plaintiff can prove by a preponderance of the evidence that damages were incurred as a proximate cause of

> that illegal activity, that is, damages flowed from that illegal activity.
>
> "You understand, of course, that you may not award the plaintiff damages simply because of lost money during the strike or for money lost as a result of the union engaging in legal and permitted activity. In a strike situation, infliction of losses both upon the union and the employer is to be expected. It is not an occasion for liability unless the losses resulted from illegal strike activity. For this reason, you may only award damages where Great Coastal has proved by a preponderance of the evidence that it was so damaged.
>
> "Now, there was some evidence here, I believe, of letters going to customers, and the Court tells you that, under the law, it was perfectly permissible for the union to ask customers of Great Coastal not to do business with Great Coastal during the course of the strike. And activity such as that is not to be considered by you in determining the amount of damages that Great Coastal has suffered." (II JA 920-922).

The jury returned a verdict of $806,093. The International moved for judgment notwithstanding the verdict or for a new trial as to all issues, basing its motion, among other things, on the impossibility that a jury could properly assess damages caused by illegal secondary boycott activity when it had heard no evidence with respect to the extent of such unlawful activity. The motion was denied (II JA 933).

B. The Court of Appeals

The International appealed from the judgment against it, and Great Coastal cross-appealed with respect to the Court's direction of a verdict against it on the allegations of violence.

The Court of Appeals affirmed. It held that there was sufficient evidence to go to the liability jury on the issue of the International's responsibility for the unlawful secondary activity (App. 22a-24a). It held also, that a partial new trial on damages only was permissible. It examined for itself the basis of the liability jury's verdict and concluded that there "is no basis to support the defendant's contention that the first verdict was fatally infected by prejudice," citing *Fairmount Glass Works* v. *Cub Fork Coal Co.*, 287 U.S. 474, 485, discussed *infra*, pp. 24-25. The Court also concluded that the issues of liability and damages were not so closely intertwined that the second jury could not consider the issue of damages apart from liability, (App. 29a-30a), and that the court's instructions on proximate cause were adequate (App. 24a-25a, 30a-31a). It did not state how the damage jury could have determined, even with the most perfect instructions, what loss had been proximately caused by conduct which the liability jury had found to be illegal, or by conduct which the liability jury had not found to be illegal.

The Court of Appeals also rejected the IBT's contention that Great Coastal had not presented sufficient evidence to go to the damage jury, because it had submitted evidence of its total strike loss only, without showing that *any* of that loss was proximately caused by a violation of § 303, purporting to apply *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555, discussed *infra*, pp. 35-41. (App. 25a).

Thereafter, the IBT filed a petition for rehearing or for rehearing *en banc* which was denied. (App. 33a-34a).

REASONS FOR GRANTING THE WRIT

Introduction and Summary

I. Rule 59(a), F.R.Civ.P., which authorizes the granting of new trials "on all or part of the issues", codifies the decision of this Court in *Gasoline Products Co.* v. *Champlin Refining Co.*, 283 U.S. 494.[1] The Court there held that the granting of a partial new trial in an action triable before a jury does not contravene the Seventh Amendment. But *Gasoline Products* "stated an important limitation on the power to grant a partial new trial that must be kept in mind."[2]

> "Where the practice permits a partial new trial, it may not properly be resorted to unless it clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without justice. * * * Here the question of damages on the counterclaim is so interwoven with that of liability that the former cannot be submitted to the jury independently of the latter without confusion and uncertainty which would amount to a denial of a fair trial." *Id.* at 500.

There are two classes of cases in which the grant of a partial new trial limited to only some issues may not be "had without injustice". The first is where it cannot be said that the error which requires the granting of a new trial did not affect the jury's determination of the case as a whole; the second is where the issues are so interwoven that, as in *Gasoline Products*, one "cannot be submitted to the jury independently of the [other] without confusion and uncertainty" (283 U.S. at 500).

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[1] See 6A Moore's *Federal Practice* (hereafter "Moore"), ¶ 59.02, p. 59-6.

[2] 11 Wright & Miller, *Federal Practice and Procedure: Civil* (hereafter "Wright & Miller"), § 2814, p. 96.

The instant case is extraordinary, if not unique, in that the limitation of the new trial to the issue of damages was impermissible for *both* of these reasons.

First, petitioner was denied a fair trial on the issue of liability. In Professor Moore's words:

> "* * * where the damages are excessive and the verdict is the product of passion or prejudice a new trial as to all the issues must be ordered." [3]

Here, although the trial court determined that the jury had been influenced by improper consideration of "gross and vicious conduct" (not attributable to the defendant) in returning an award far greater than the plaintiff's claim (App. 6a-7a), it nevertheless granted a new trial on damages only. This decision "amount-[ed] to a denial of a fair trial" (283 U.S. at 500) to the defendant with respect to liability. As this ruling involves the fundamental right of each litigant to have every issue determined by a tribunal uninfected with prejudice, it plainly merits this Court's attention in the exercise of its supervisory powers over the administration of justice in the federal courts. That power is additionally implicated by the Court of Appeals' speculation (without record support and contrary to the standards of *Gasoline Products*) that the jury may have acted properly, for that court thereby substituted its own views for those of the trial judge, with respect to a subject within his special competence —as this Court has held in an opinion by Brandeis, J. which the court below cited, but unfortunately misapplied. Lastly, the decision below should be reviewed on this issue in order to harmonize this case with this

[3] Moore, ¶ 59.06, p. 59-84, citing, *inter alia*, *Minneapolis, St. Paul & Sault Ste. Marie Ry. Co.* v. *Moquin*, 283 U.S. 520, quoted, p. 19, *infra*.

Court's precedents and with decisions of other courts of appeals with which the decision below cannot be reconciled.

Second, because of the applicable substantive law, this action is in the class described by Prof. Moore where "the amount of damages may not be determined without a redetermination of the liability issue [so that] a new trial as to all the issues must be ordered." [4] That substantive law is declared in *Teamsters Union* v. *Morton*, 377 U.S. 252, which holds that in a suit under § 303 a plaintiff may recover only those losses which were proximately caused by a violation of § 8 (b)(4); a plaintiff may not recover losses proximately caused by primary strike activity even if some of the union's other conduct violated § 8(b)(4). *Id.* at 260-262, quoted at pp. 25-26 *infra*. Because the basis of the first jury's liability determination was unknown to the second jury, it was a logical impossibility for the latter to determine what losses were proximately caused by conduct for which the first jury had found defendant liable and to restrict its damage award to losses so caused. What should have been self-evident as a matter of logic was confirmed by experience at the damage trial: Plaintiff introduced evidence only as to its total strike losses, making no effort whatsoever to connect all or part of those losses with particular incidents of secondary activity which had been before the first jury and on which that jury even *might* have based its liability determination. The trial court instructed the second jury that it was to take as given the proposition that the union had been found guilty of illegally causing "the employees of *certain* of the plain-

[4] *Id.*, pp. 59-81 to 59-82.

tiff's customers to refuse to handle the plaintiff's freight" (II JA 920, emphasis added); it did not, because it could not, identify those "certain" customers. Inevitably, therefore, the damage jury had no basis whatever for determining what losses were proximately caused by those acts of picketing which the liability jury had determined to be illegal, and what losses were lawfully inflicted.

Violation of the precepts of *Gasoline Products* thus became the instrument for depriving the defendants of their right under *Morton* not to be assessed damages for strike losses inflicted by lawful primary activity, and defeated Congress' policy in limiting the § 303 remedy. Review of this case is therefore essential to preserve that policy. And its importance extends well beyond the § 303 context; for, if liability and damages may be tried separately in a case where law and logic render them inseparable, the lower courts will at best be uncertain whether anything of substance remains of the "important limitation" on the granting of a partial new trial established in *Gasoline Products* and previously honored by the courts of appeals in administering Rule 59(a).

II. In holding that the plaintiff submitted sufficient evidence to go to the jury on the issue of damages, although it introduced no evidence that any of its strike losses were proximately caused by unlawful activity, the Court of Appeals further undermined the Congressional policy declared in § 303 as construed in *Morton*. The Court relied on the *Story Parchment* case, 282 U.S. 555, which holds that where uncertainty in the amount of damages is due to the actions of the tortfeasor the plaintiff may recover damages caused

by the tort upon a just and reasonable approximation thereof. But there are three reasons why *Story* does not justify the result reached by the Court of Appeals: 1) *Story* does not dispense with the plaintiff's burden to establish the fact of damage without speculation (see *id.* at 262); it is that burden which Great Coastal failed to meet. 2) The *Story* rule applies only where the tort created the uncertainty; here, there was no reason other than plaintiff's own choice why it could not have established damages proximately caused by tortious conduct with specificity. 3) The *Story* rule does not, as we show below, on the basis of reason and authority, apply in a case like the present which requires apportionment between losses lawfully inflicted on the plaintiff and losses unlawfully inflicted upon him. In short, there is no tension between the proof requirements of *Morton* and the holding of *Story*.

This Court so recognized in *Morton* itself where the respondent relied heavily on *Story* in order to recover the damages which this Court denied him on the basis of the "by reason of" language in § 303 (377 U.S. at 261-262). See Brief for Respondent, No. 485, Oct. Term, 1963, pp. 17-23.

Unless a plaintiff in a § 303 suit is required to prove that the losses which he claims were proximately caused by violations of § 8(b)(4), rather than by lawful strike activity, this Court's holding in *Morton* will be stripped of all vitality. Employers and their counsel will not be slow to grasp the object lesson which Great Coastal's recovery provides. To avoid future abuses of § 303, and to preserve the intent of Congress so clearly articulated in *Morton*, the judgment of the Court of Appeals should be reviewed and ultimately reversed.

I. BY DIRECTING A NEW TRIAL RELATED TO THE ISSUE OF DAMAGES, THE DISTRICT COURT DENIED PETITIONER A FAIR TRIAL ON LIABILITY AND ITS RIGHT UNDER TEAMSTERS UNION v. MORTON, 377 U.S. 252, TO BE ASSESSED FOR ONLY THOSE DAMAGES PROXIMATELY CAUSED BY UNLAWFUL CONDUCT.

A. Petitioner Was Denied a Fair Trial Because the Liability Jury's Verdict Was Fatally Infected by Prejudice.

"A fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison,* 349 U.S. 133, 136; *Groppi* v. *Wisconsin,* 400 U.S. 505, 509. The jury which established defendant's liability did not satisfy that basic requirement. The jury returned a verdict for $1,300,000, an amount for which there was not a shred of evidence in the record, and which exceeded plaintiff's own claim by over $350,000. The District Judge set aside the verdict for damages saying "the jury, while well intentioned, was in spite of the Court's instructions to the contra influenced in its consideration by the gross and vicious conduct attributed to the members of the local union and their sympathizers" (App. 6a). But despite his own finding of prejudice, the Judge accepted the jury's verdict as establishing defendant's liability and ordered that the new trial be limited to the question of damages. He thereby deprived defendant of its right to a fair trial on the issue of liability, and departed from the teachings of this Court.

In *Minneapolis, St. Paul & Sault Ste. Marie Railway Co.* v. *Moquin,* 283 U.S. 520, the issue was whether when a state trial court determines, in an action under the Federal Employers' Liability Act, that a jury verdict was infected with passion and prejudice, the court may direct a remittitur of damages which it regards as excessive, or whether it must grant the defendant a new trial. This Court directed a new trial:

> "In actions under the federal statute no verdict can be permitted to stand which is found to be in any degree the result of appeals to passion and prejudice. Obviously such means may be quite as effective to beget a wholly wrong verdict as to produce an excessive one. A litigant gaining a verdict thereby will not be permitted the benefit of calculation, which can be little better than speculation, as to the extent of the wrong inflicted upon his opponent." (*Id.* at 521-522).

Again, in *Dimick* v. *Schiedt,* 293 U.S. 474, 486, the Court said:

> "Where the verdict returned by a jury is palpably and grossly inadequate or excessive, it should not be permitted to stand; but, in that event, both parties remain entitled, as they were entitled in the first instance, to have a jury properly determine the question of liability and the extent of the injury by an assessment of damages."

The denial of a new trial with respect to liability was also in conflict with recent decisions of the Second [5] and Eighth [6] Circuits;[7] it is also contrary to the

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[5] *Sharkey* v. *Penn Central Transportation Co.,* 493 F.2d 685, 689 (C.A. 2):

> "It is apparent that the verdict here was unconscionable and reflected a prejudice against the carrier, exacerbated by an intemperate summation which resulted in a punitive verdict. • • • Under the circumstances, the verdict was clearly excessive.[2] While the trial court recognized this, the remittitur was nonetheless totally unrealistic. In fact, it is difficult to understand on what basis it was computed. We are there-

views of the leading commentators on federal practice.[8]

On this point the decision below also contravenes the holding of *Gasoline Products, supra* (decided on the same day as *Moquin*), that the power to grant a partial new trial may be exercised only if "it *clearly appears* that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice * * *" (283 U.S. at 500, emphasis added). That decision has properly been understood by the courts of appeals as holding that the power to grant a limited new trial "is to be exercised with caution and not when the error which necessitates a new trial is in respect of a matter which *might well have* affected

fore convinced that the judgment here must be reversed and a new trial ordered."

In Footnote 2 the Court "noted that the jury's original verdict of $125,000 was precisely the sum twice suggested to them by plaintiff's counsel in summation * * *". Here the verdict was substantially *greater* than that which plaintiff claims.

[6] *Perry* v. *Bertsch*, 441 F.2d 939, 946 (C.A. 8):

> "The verdict is so excessive as to shock our conscience, and we conclude that the ends of justice will best be served by the district court's setting aside the judgment. We, therefore, reverse and remand this case for a new trial."

[7] The decision below is also an abrupt departure from two earlier decisions in the Fourth Circuit which were limited to their precise facts, *Ford Motor Co.* v. *Mahone*, 205 F.2d 267, 272 (C.A. 4); *United Construction Workers* v. *Haislip Baking Co.*, 223 F.2d 872, 879 (C.A. 4). See App. 27a-28a.

[8] See Moore, quoted at p. 14, n. 3 *supra*, and *id.* ¶ 59.08[4], p. 59-125: "Since the jury should act fairly and impartially, a new trial should be granted when the verdict is the result of mistake, passion, prejudice, or improper motive on its part." See also 11 Wright & Miller, § 2814, pp. 96-97, as corrected in 1975 Pocket Part, p. 8.

the jury's determination of other issues."[9] Where, as here, a jury renders a flagrantly excessive verdict which was, as the trial judge found, influenced by improper considerations, a court "cannot confidently say"[10] that the jury was not likewise influenced by improper considerations in determining the defendant to be liable. On the contrary, it is utterly implausible to surmise that a jury which, despite the Court's instructions, was influenced by "gross and vicious conduct attributed to members of the local union and their sympathizers" (App. 6a) in considering *damages*, would not have been influenced by this conduct when considering *liability*, which was, as it knew, a necessary predicate for the enormous award it believed this defendant should pay.

The opinion of the Court of Appeals herein provides an object lesson of the inadvisability of such speculation and the wisdom of the rule which requires a new trial on all issues where "subtle subjectiveness of jury determination leaves [the] court in doubt as to the propriety of the jury's determination" on any issue,

[9] *Geffen* v. *Winer*, 244 F.2d 375, 376 (C.A.D.C., emphasis added).

[10] The language quoted is from an extensive discussion of the *Gasoline Products* rule in *Camalier & Buckley- Madison, Inc.* v. *Madison H., Inc.*, 513 F.2d 407, 420-422 (C.A.D.C.).

The Court also said:

> "Whether these or other possible consequences actually followed the handling of the matter is something we will never know. It is enough, however, that one or more may have; and viewing the situation realistically, we cannot confidently say that none did. In other words, we lack reasonable assurance that Madison did not suffer injustice through misapprehension of the jury as to something material to the verdict. Our duty, then, is to afford Madison a new trial on damages as well as liability." *Id.* at 422.

Williams v. *Slade,* 431 F.2d 605, 609 (C.A. 5).[11] The Court of Appeals attributed to the District Judge the "conclusion that the first verdict was based on honest judgment by a well-intentioned jury" (App. 29a), and thereupon substituted for the District Court's explanation of the jury's verdict, its own hypothesis:

> "The court charged the jury that no acts of violence testified to could be considered in assessing any damages, and that damages were limited to losses which flow proximately from any illegal activity the jury might find. During deliberations, the jury inquired of the court, 'What amount of damages lost in dollars is the plaintiff asking? Is it the $942,065 figure?,' to which the court responded '. . . yes . . . I must tell you that you are not to concern yourselves with what the plaintiff asks for unless it coincides with the evidence as you find it.' 350 F.Supp. at 1378. It is obvious from the foregoing that the jury did not consider the $942,065 as a limiting figure, but we are unable to say from the record that the excessive verdict was caused from anything more than a misunderstanding of the jury charge as not limiting the recovery to pecuniary loss as mentioned in the question asked the court." (App. 29a).

[11] The foregoing follows a thorough analysis of the standard which *Gasoline Products* requires for determining whether there may be a partial new trial:

> "In other words, a court may properly award a partial new trial only when the issue affected by the error could have in no way influenced the verdict on those issues which will not be included in the new trial. If the decision on the other issues could in any way have been infected by the error then a new trial must be had on all issues. For example, partial new trials as to damages alone have been rejected when it appeared that the error on the damage issue affected the determination of liability." *Id.* at 608.

Not only is the Court of Appeals' hypothesis utterly without basis in the record,[12] it fails to address the critical issue in determining whether it "clearly appears" that liability and damages were "separate and distinct" in the jury's consideration. Granting that the jury erroneously believed, for *any* reason, that it had the power to enter a verdict in excess of the plaintiff's demand, although that award had no basis in the evidence, why did the jury exercise that power in this case? Surely the correct answer is that of the District Judge, that the jury did so because it was moved by the evidence of violence which it had been instructed not to consider. If that assessment is accepted, it does not "clearly appear" that liability and damages are "separate and distinct"; rather, it is evident that the jurors could have given the defendant a fair trial on liability only by a psychological feat which in reason should not be, and under the precedents which we have cited, may not be, attributed to them.

The error which the trial court made was its failure to draw the legally required conclusion from that determination. The Court of Appeals compounded that error by transgressing its proper appellate role, for

[12] The idea that the verdict may have been based on the jury's view that it was empowered to award damages for other than "pecuniary loss" originated in the Court of Appeals' opinion. Pecuniary loss was *not* "mentioned in the question asked the court" (App. 29a); as we have seen, the jury inquired only as to the amount plaintiff was asking. And plaintiff never even suggested that the jury should award damages in excess of the $942,065 which it asserted to be its actual strike loss; nor did it assert *any* non-pecuniary loss. Even on appeal it did not advance the explanation of the jury's behavior which the Court of Appeals adopted; indeed, plaintiff said *nothing* on the point that the liability verdict was infected with prejudice, although this was the first point in the union's brief on appeal.

the Courts of Appeals should not substitute their own views for those of the District Courts in interpreting jury behavior. Ironically, the one decision which clearly establishes that both courts below were wrong, is the opinion of Mr. Justice Brandeis on which the Court of Appeals mistakenly relied (App. 30a), *Fairmount Glass Works* v. *Cub Fork Coal Co.*, 287 U.S. 474, 485:

> "The record before us does not contain any explanation by the trial court of the refusal to grant a new trial, or any interpretation by it of the jury's verdict.[12] In the absence of such expressions by the trial court in the case at bar, the refusal to grant a new trial cannot be held erroneous as a matter of law. Appellate courts should be slow to impute to juries a disregard of their duties, and to trial courts a want of diligence or perspicacity in appraising the jury's conduct."

[12] Compare Minneapolis, St. P. & S. Ste. M. R. Co. v. Moquin, 283 U. S. 520, in which the trial court expressing the opinion that the verdict was excessive because of passion and prejudice, nevertheless refused, on the filing of a remittitur, to grant a new trial."

The Court of Appeals quoted the last sentence of the foregoing in support of the proposition that it (the Court of Appeals) should not speculate "as to what the jury considered in its deliberations" (App. 30a). Since the Court did in fact indulge in such speculation, this statement is somewhat self-defeating. In any event, the present case differs from *Fairmount* in that the record here *does* "contain an interpretation by the trial court of the jury's verdict"; this brings into play not the first proposition stated in the sentence quoted by the Court of Appeals, but the second, that "[a]ppellate courts should be slow to impute * * * to trial courts

a want of diligence or perspicacity in appraising the jury's conduct" (287 U.S. at 485). Yet, as we have seen, the Court of Appeals did just that. And while *Fairmount* held that appellate courts should be slow to determine that juries have disregarded their duties where the trial court is silent, Justice Brandeis did not relieve the appellate courts of responsibility to protect the integrity of the judicial process where the trial court finds that the jury has disregarded its duty, but nevertheless permits its verdict to stand in whole or in part. On the contrary, by contrasting *Fairmount* with *Moquin*, he reaffirmed their duty to correct such errors. On this record then, the reasoning of *Fairmount* compels the result of *Moquin*.[13]

B. It Was Impossible for the Damage Jury to Observe the Prohibition Declared in Morton Against Providing Compensation for Lawful, Primary Strike Activity.

In *Teamsters Union* v. *Morton*, 377 U.S. 252, this Court held unanimously "that recovery for an employer's business losses caused by a union's peaceful secondary activities proscribed by § 303 should be limited to actual, compensatory damages" (*Id.* at 260). The Court held further that "[s]ince § 303(b) authorizes an

[13] The point can profitably be approached in terms of the distinction between issues of fact and of law which was stressed throughout the *Fairmount* opinion, 287 U.S. at 481-485. Interpretation of the jury's behavior was treated as an issue of fact within the special competence of the trial courts; the consequence of a finding that the jury had disregarded its duty was treated as a question of law as to which the appellate courts may not defer. In *Fairmount*, the Court of Appeals was reversed because it had exceeded its proper function by setting aside the District Court's resolution of the question of fact; in *Moquin* the judgment of the Supreme Court of Minnesota was reversed because it had incorrectly decided the question of law. The judgment of the Court of Appeals in this case is subject to reversal on both grounds.

award of damages only in the event of injury 'by reason of any violation of subsection (a)' and peaceful primary strike activity does not violate § 303(a), *Electrical Workers Local 761* v. *Labor Board,* 366 U.S. 667, 672, the District Court was without power to award damages proximately caused by lawful, primary activities, even though the petitioner may have contemporaneously engaged in unlawful acts elsewhere" (*id.* at 261-262). This holding reflected both the language and the legislative history of § 303 (*id.* at 260) as well as the insight that allowing recovery for any peaceful strike activity which did not violate § 8(b)(4) would penalize the use of a "weapon of self-help, permitted by federal law, [which] formed an integral part of the [union's] effort to achieve its bargaining goals during negotiations with the respondent" (*id.* at 259).

The teachings of *Morton* were reaffirmed in *Mine Workers* v. *Gibbs*, 383 U.S. 715, 731, n. 17:

> "In Local 20, Teamsters, Chauffeurs and Helpers Union v. Morton, supra, a similar analysis was applied to permit recovery under § 303 of damages suffered during a strike characterized by proscribed secondary activity only to the extent that the damages claimed were the proximate result of such activity; damages for associated, primary strike activity could not be recovered."

Thus, under *Morton,* plaintiff was entitled to recover for only those losses which were proximately caused by unlawful secondary activity.

During the first trial the jury had heard evidence with respect to a myriad of strike-related activity: picketing at Great Coastal's terminals; direct appeals to Great Coastal's customers; the following of Great Coastal's trucks; the eight instances of possible secondary boycott activity at a customer's premises; and, of course, violence. The first three of these activities were clearly privileged as a "weapon of self-help, permitted by federal law * * *," *Morton*. Whether the eight instances at a customer's premises violated § 8(b)(4) would very much depend on how the jury evaluated those incidents.[14] For, "there are two threads to § 8(b)(4)(B) that require disputed conduct to be classified as either 'primary' or 'secondary,' [a]nd the tapestry that has been woven in classifying such conduct is among the labor law's most intricate." (*NLRB* v. *Operating Engineers,* 400 U.S. 297, 303). Absent specific determinations by the first jury as to which of the incidents of secondary activity were unlawful—that is, in which instances the means and objects proscribed by § 8(b)(4)(B) coalesced—there is no way of knowing or identifying the incident or incidents or the extent of such incidents on which the liability verdict was based. Thus, when the new trial began on the issue of damages, there was no way the District Court could have avoided the possibility that the second jury, charged only with deciding the question of damages, would base that verdict on conduct which the first jury had not found to be unlawful.

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[14] The evidence with respect to at least one of these customers, Southern Special Products Corp., pp. 1c-2c, *infra,* clearly showed that that customer's decision to cease doing business with Great Coastal was not due to illegal secondary activity, since its traffic manager testified that the decision was made at the request of his consignees. Even if the jury would have been authorized to discredit that testimony, and to conclude that the decision was based on the request of two Local 592 officials who met with him, no violation would be established by that incident because such requests are lawful, as *Morton* itself holds, 377 U.S. at 259; see also *Labor Board* v. *Servette,* 377 U.S. 46.

It is clear from the foregoing that under the standard declared in *Gasoline Products, supra,* which we have already discussed at length, it was impermissible to limit the new trial to damages. For, under *Morton's* proximate cause rule, the amount of damages was, as a matter of most elementary logic, "so interwoven with that of liability that the former cannot be submitted to the jury independently of the latter without confusion and uncertainty, which would amount to a denial of a fair trial" (283 U.S. at 500). Not only does it fail to "clearly appear * * * that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice," as *Gasoline Products* requires, it clearly appears that the separate trial inevitably deprived the defendant of the right to a judgment limited to those damages caused by activity which was found to be illegal by *some* jury.

In *Gasoline Products,* the Court of Appeals, finding error in the trial court's charge with respect to the measure of damages on a counterclaim, had directed a new trial on that issue alone (*id.* at 496). This Court reversed, saying:

> "The verdict on the counterclaim may be taken to have established the existence of a contract and its breach. Nevertheless, upon the new trial, the jury cannot fix the amount of damages unless also advised of the terms of the contract; and the dates of formation and breach may be material, since it will be open to petitioner to insist upon the duty of respondent to minimize damages.
>
> "But it is impossible from an inspection of the present record to say precisely what were the dates of formation and breach of the contract found by the jury, or its terms." *Id.* at 499.

The situation in the present case is indistinguishable. For here, "upon the new trial, the jury [could not] fix the amount of damages unless also advised" *which* of the incidents of strike activity were found by the jury to have been in violation of § 8(b)(4). And this, the first jury's general verdict could not make known.

The inevitable result was that the damage trial could not be conducted within the framework of *Morton,* which deprives juries of "power to award damages proximately caused by lawful, primary activities, even though the petitioner may have contemporaneously engaged in unlawful acts elsewhere" (*id.* at 261-262).

What the verdict *did* establish was a ceiling on the amount the plaintiff could recover, in conformity with *Morton.* For, if the verdict were interpreted most favorably to plaintiff, it would establish that the eight incidents of ambulatory picketing which were before it (Appendix C, *infra*) constituted violations of § 8(b)(4). Thus, plaintiff was entitled to recover at most the losses proximately caused by these eight incidents. Great Coastal, apparently realizing that the upper limit thus established would result in no recovery or a small one, did not offer to prove what damages were proximately caused by secondary activity. Instead, it presented evidence only of its entire strike loss without relating this loss to illegal activity.

The jury was thus confronted with an impossible task. It knew the amount the plaintiff claimed as its total strike loss, and it was instructed that the verdict of the first jury had established that the defendant had engaged in *certain* unlawful conduct and that the plaintiff was entitled to recover for the losses proximately

caused by that conduct; it was also instructed that the defendant had engaged in some lawful conduct and that the plaintiff was not entitled to recover for losses proximately caused by that conduct.[15] On the basis of this information the jury was called upon to determine how much of plaintiff's strike loss was proximately caused by conduct which the first jury had determined to be illegal. It plainly lacked the following information which was indispensable to a rational performance

[15] In describing the trial court's instructions to the damage jury, the Court of Appeals said: "*The judge again correctly charged the jury which ambulatory picketing activities were lawful, and which were unlawful,* and among several references to proximate cause in his charge which required the company to prove its damages were proximately caused by the unlawful activities of the union as contrasted to the lawful, told the jury: * * *" (App. 24a, emphasis added). The underscored portion of the foregoing misreads the trial court's instruction on this point, which we have quoted in full at pp. 10-11 of the Statement. Moreover, it is self-evident that the judge could not have charged the jury *which* ambulatory picketing activities the first jury had found to be lawful and which it had found to be unlawful, because the trial judge could not have known this, given the general verdict.

The Court of Appeals also stated, in approving the trial court's instruction, that "plaintiff took the position and offered evidence which tended to show that all its damages claimed in the second trial were caused by the unlawful activities of the defendant as distinguished from the lawful." (App. 31a) It is true that plaintiff took this position, but the only evidence it offered was the opinion of Great Coastal's President Estes, which was admitted over objection, and which the jury was instructed to disregard. *See* pp. 9-10, *supra*. Significantly, the Court of Appeals does not describe the "evidence" to which it refers, and in its prior discussion of the same point (App. 24a), it describes the plaintiff's aforesaid position, but does not state that it offered any evidence. Here again, it is not even necessary to look at the record, because Mr. Estes could no more have known what the first jury determined to be unlawful than could the trial judge, or anyone else. Thus, quite aside from its other infirmities, Estes' opinion was worthless because of the bifurcation of the liability and damage trials.

of this task: 1) it could not identify the incident or incidents which the first jury had determined were illegal (and for which alone the plaintiff could recover); and 2) it did not know with respect to any conduct (whether legal or illegal under the first jury's verdict) what loss, if any, it inflicted on the plaintiff. The first of these fatal gaps in the jury's information was the inevitable consequence of the decision to hold a separate damage trial. The second was the consequence of plaintiff's trial strategy. The result was a verdict of $806,093, of which one can say at most that it may have been the jury's calculation of plaintiff's total strike loss, but of which it certainly cannot be said that it granted recovery only for damages proximately caused by activity which the liability jury had found to be illegal.

The ramifications of the procedure sanctioned in this case are of wide-ranging significance, for if the restrictions declared in *Gasoline Products* on the granting of a partial new trial may be ignored in this case, they may be ignored in any other case. No situation is imaginable in which liability and damages are more clearly interwoven. The innovation in applying Rule 59(a) F.R.Civ.P. sanctioned by the court below amply warrants review in the exercise of this Court's supervisory powers. And if there is doubt that the Court of Appeals' disregard of the "important limitation on the power to grant a new trial" [16] declared in *Gasoline Products* is sufficient to warrant review, then it would surely be dispelled by the conflict between the decision below and those of other courts of appeals which have been faithful to those precepts. We particularly invite the Court's attention to two very recent decisions, *Richardson* v. *Communications Workers,* 91 LRRM

[16] See Wright and Miller, p. 13, n. 2 *supra*.

2506 (C.A.8),[17] and *Jamison Co., Inc.* v. *Westvaco Corp.*, 526 F.2d 922 (C.A.5, Feb. 6, 1976).[18]

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[17] "Neither was there an abuse or discretion in failing to limit the new trial to damages only. The nature of the case was such that the liability and damages issues were interwoven to such an extent that a trial on damages alone would have been inappropriate. Plaintiff's claim for mental anguish and humiliation involved conduct by a larger number of individuals over a seven-month period. In determining damages to be awarded against the Local or International, or neither or both, it was necessary for the jury to determine who committed what acts and the responsibility of the parties under applicable principles of agency. Thus the issues of damages and liability were so intertwined as to be inseparable. Under these circumstances a partial trial on damages alone would have been improper. See Gasoline Refining Co., 283 U.S. 494, 500 (1931); Vidrine v. Kansas City Southern Railway, 466 F.2d 1217, 1221 (5th Cir. 1972); United Air Lines, Inc. v. Wiener, 286 F.2d 302, 306 (9th Cir. 1961). No abuse of discretion in granting a new trial on all issues arising under the mental anguish claim has been shown here." *Id.* at 2508.

[18] "Because this litigation is nearly six years old and because the original trial lasted three weeks, we hesitate to require a new trial on all issues. However, the district court's use of a general verdict leaves us no alternative.

"Generally, in cases such as this, the appellate court avoids a wasteful retrial of the entire controversy through the use of one of two devices.

* * *

"The second device for avoiding a full retrial is a partial new trial limited to the damage issues. *See generally* C. Wright & A. Miller, *supra* at § 2814 (1973). Unfortunately, our uncertainty as to the jury's resolution of the liability issue also forecloses this method. Without a prior determination of the basis for liability, the district court on remand for a partial new trial would be unable to instruct the jury as to damages. In other words, partial remand is permissible only where one has a definite furcation. Here, the contractual obligations and damages flowing from their breach are not separable, but rather are inextricably bound together. They are not independent, but are interdependent. Justice commands that we sunder them not, notwithstanding our quest to avoid unnecessary and repetitious judicial efforts." *Id.* at 935-936.

However, the problem raised by the decision below is particularly acute in suits under § 303 of the Act, where the instant proceedings provide a model for evading the Congressional decision to restrict damages which a plaintiff may recover to losses proximately caused by conduct violative of § 8(b)(4) and to deny recovery for losses proximately caused by lawful primary strike activity, which Congress has chosen to protect. Thus, we submit that this phase of the case also presents an important question in the administration of the labor laws and of assuring fidelity to this Court's decision in *Morton*.

II. BY RELIEVING PLAINTIFF OF THE BURDEN OF PROVING THAT IT SUFFERED LOSSES "BY REASON OF" A VIOLATION OF § 303, THE COURT OF APPEALS DEFEATED CONGRESSIONAL POLICY AS DECLARED IN MORTON.

As we have seen, at the second trial (as at the first) the plaintiff introduced evidence only of its total strike losses; it did not offer any evidence connecting any illegal act (whether it had been before the first jury or not) with any loss. IBT contended before the trial court, and in the Court of Appeals that the plaintiff had thereby failed to meet its burden of proof with respect to any damage, and was therefore not entitled to go to the jury at all. The Court of Appeals rejected this contention in reliance on the authority of *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555, which holds:

> "Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, *it would be a perversion of fundamental principles of justice to deny all relief to the injured person and thereby relieve the wrongdoer from making any amends for his acts.* In such a case, while the damages may not be de-

termined by mere speculation or guess, it will be enough if the evidence shows the extent of the damages as a matter of just and reasonable inference, although the result may be only approximate. The wrongdoer is not entitled to complain that they cannot be measured with the exactness and precision that would be possible if the case, which he alone is responsible for making, were otherwise." *Id.* at 562-563, emphasis added to show the portion quoted at App. 25a.

The Court of Appeals' ruling (a) misconceives the rule of the *Story* case; (b) undermines the holding of *Morton supra,* that a plaintiff may recover only for damages proximately caused by unlawful conduct, by adopting an argument which was unsuccessfully advanced in that case and, (c) is in conflict with decisions of other Circuits which place upon the plaintiff the burden of proving the fact of causation. This issue is one of recurring importance in the administration of the Act, since it can arise in any § 303 suit, (whether or not the District Court has improperly bifurcated the trial of liability and damages). It therefore independently warrants the grant of certiorari.

There are three separate reasons why the *Story* rule does not sanction the trial court's action: 1) The *Story* rule comes into play only where plaintiff has established the fact of damage caused by defendant's wrongful acts; 2) plaintiff here did not bring itself within *Story,* because it did not demonstrate that it would be impossible (or even burdensome) to prove more precisely the damages thus caused, much less that any difficulties in proof were created by defendant's tortious conduct; and 3) *Story* does not state the rule for apportioning losses between those resulting from defendant's tortious con-

duct, and those lawfully inflicted by defendant in primary strike activity, as *Morton* requires.

1. The distinction between proof of the fact of damage and the amount of damage is expressly drawn on the face of the *Story* opinion:

> "This characterization of the basis for the verdict is unwarranted. It is true that there was uncertainty as to the extent of damage; but there was none as to the fact of damage; and there is a clear distinction between the measure of proof necessary to enable the jury to fix the amount. The rule which precludes the recovery of uncertain damage applies to such as are not the certain result of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in respect of their amount." (282 U.S. at 562.)

In the present case, Great Coastal failed to show that even "some damage" had been caused by secondary activity because it showed only that it had incurred losses due to the strike, which included lawful activity. Since Great Coastal made no showing—it has not demonstrated the *fact* of damages—the question of "the measure of proof necessary to enable the jury to fix the amount" of damage (*Story* at p. 562) simply does not arise.

2. In relieving plaintiff of the obligation of fixing the amount of damages with certainty, the *Story* case did not hold that speculation as to the amount of damages is desirable or that tortfeasors as a class should be punished by allowing tort victims to recover speculative damages. Rather, the *Story* rule is one of necessity and fairness: Where the uncertainty is inherent in the tort, it is believed to be more just that the tortfeasor rather than the victim bear the uncer-

tainty. See also *Bigelow* v. *RKO Radio Pictures,* 327 U.S. 251, 265.[19]

In the present case, Great Coastal made no showing of its "inability to prove complete and accurate data from which his loss can be ascertained", nor of course that such an inability was "the effect of the defendant's wrongful act." On the contrary, the nature of the case is such that Great Coastal could readily have established its proximately caused damages with specificity.[20] If any of its customers had in fact stopped doing business with it as a result of unlawful secondary activity, Great Coastal could have produced those customers as witnesses. It could also have produced *bona fide* business records to show how many, if any, deliveries were turned away by customers because of unlawful secondary activity, and the consequent damages. Mr. Estes testified that the reason Great Coastal Express was unable to maintain a list of shipments that could not be delivered during the strike was that "[i]t would cost money," (II JA 808) although he had previously admitted that he did not know what

[19] The Court of Appeals characterized the holding in *Story* as applying "where the amount of damages cannot be ascertained with certainty" (App. 25a). It omitted that portion of the sentence which it quoted which states the qualification (on which we had relied, and on which we rely here) "Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty". See the sentence in full at p. 33 *supra.*

[20] The trial Judge also felt more specificity was possible:

THE COURT: . . . "Counsel should know, and the Court of Appeals should know . . . I have serious doubts . . . that this is a case in which damages could not have been shown with more specificity. I just cannot imagine not being able . . . [to have] . . . some sort of a record to show reasonable shipments that [Great Coastal was] not able to make . . . because of a particular illegal conduct on the part of the defendant." (II JA 911)

kinds of records were kept. (II JA 807) The *Story* rule does not place on the defendant the onus for plaintiff's failure to keep adequate records. To allow the plaintiff to recover damages which he did not show to be caused by defendant's unlawful conduct is to convert the *Story* rule of necessity and fairness into an instrument of injustice whenever the plaintiff as a matter of choice fails to present evidence which will remove, or lessen, any uncertainty as to the damages which plaintiff is entitled to recover. And where as here, the plaintiff, rather than the defendant had or could have had records which would enable it to establish the damages proximately caused by the defendant's illegal conduct, the result reached below reverses "the ordinary rule, based on consideration of fairness, [which] does not place the burden upon a litigant of establishing facts peculiarly within the knowledge of his adversary. *United States* v. *New York, N. H. & H. R. Co.,* 355 U.S. 253, 256, note 5." *Campbell* v. *United States,* 365 U.S. 85, 96. See also, *South Carolina* v. *Katzenbach,* 383 U.S. 301, 332.

3. Additionally, the *Story* rule does not deal with the question of proof of damages where plaintiff's total loss is known or ascertainable, but he is lawfully entitled to recover only a portion of that loss. That is the issue in the present case. That *Story* is not applicable can be demonstrated both by analysis and authority.

In the typical anti-trust case, for example, where the plaintiff is seeking to recover for the loss of business, *Story* permits the jury to infer the amount of that loss from evidence regarding the plaintiff's business prior to the anti-trust violation. The validity of that inference depends on the assumption that but for

the violation the plaintiff's business would have remained the same (or would have improved at some uniform rate). Absent any other cause for the plaintiff's loss, that assumption is reasonable. But where that assumption cannot be made because it is shown that other circumstances may have contributed to plaintiff's losses, the inference is purely arbitrary. It is this latter situation which obtains here, since it is undisputed that there was a strike in which the plaintiff was lawfully subject to economic injury inflicted by the defendant, and in which defendant engaged in such activity.

The distinction which we draw has been understood in applying *Story* in the anti-trust field. Compare *Momand* v. *Universal Film Exchanges,* 172 F.2d 37, 42 (C.A. 1) with *id.* at 43. It also accords with the general theory of the law of torts as declared in the A.L.I. Restatement of Torts, 2d.

The relevant sections of the Restatement are 433A (defining the situations in which apportionment should be made) and 433B (assigning the burden of making the apportionment). In Section 433A, the Restatement does indeed provide that apportionment is proper even where one of the causes is innocent or privileged. See, e.g., Comment (e), "Innocent Causes", which states in part:

> "Apportionment may also be made where a part of the harm caused would clearly have resulted from the innocent conduct of the defendant himself, and the extent of the harm has been aggravated by his tortious conduct."

But Section 433A does *not* purport to state who has the burden of proving that apportionment, and instead

expressly provides, in Comment (g), that all burden of proof questions are dealt with in Section 433B.

Section 433B(1) states the general rule on burden of proof, which is to be applicable except in the specific situations detailed in 433B(2) and (3). The *general rule* is that "the burden of proof that the tortious conduct of the defendant has caused the harm to the plaintiff is upon the plaintiff" (Section 433B(1)). The two exceptions deal with the situations either where the plaintiff has been injured by two causes each of which is tortious, or where it is proved that two persons acted tortiously and the harm was caused by only one of them; in these situations, the Restatement recommends that the burden be placed on the tortfeasors to allocate responsibility between themselves (Section 433B(2) and (3)).

Thus, the Restatement does *not* place the burden of making the apportionment upon the defendant where there are both tortious and innocent causes. On the contrary, since this situation is not covered by the exceptions, it is governed by the general rule enunciated in Section 433B(1) and "the burden of proof . . . is upon the plaintiff."

Other courts of appeals have recognized that it is the burden of the plaintiff in a § 303 suit to establish the fact of damage and have understood that *Story* does not do away with this burden, but rather relieves the plaintiff of the need to prove damages to a certainty, permitting a just and reasonable approximation. See *e.g., Landstrom* v. *Chauffeurs, Teamsters, Etc., Loc. U. No. 65,* 476 F.2d 1189, 1194-1195; *Refrigeration Con., Inc.* v. *Local Union No. 211, Etc.,* 501 F.2d

668, 670-671 (C.A. 5); *Mead* v. *Retail Clerks Int. Ass'n, Etc.*, 523 F.2d 1371, 1376-1379 (C.A.9).[21]

3. The proposition asserted by the Court of Appeals was advanced by the respondent in *Morton*, who contended:

> "The most that can possibly be correctly said for the Teamsters Union's position is that it is uncertain as to how many of Respondent's truck drivers failed to report to work during the strike because of (1) the Teamsters Union's secondary activity violative of Section 303, LMRA, (2) the Teamsters Union's secondary activity violative of the state common law, or (3) only because of the picket line at Respondent's garage. The Teamsters Union introduced no testimony of any driver-employees, if there were any, who stayed away ONLY because of the picket line at Respondent's garage. The District Court found as a fact that the Wilson job was lost as a result of a combination of the Teamsters Union's lawful and unlawful strike activity (R. 274).
>
> If there is any uncertainty about the Wilson element of damages, i.e., the number of Respondent's drivers who failed to report to work for duty on the Wilson job because of (1) the Teamsters Union's unlawful secondary activity on the one hand and (2) the Teamsters Union's picket line at Respondent's garage on the other, then not the Respondent but the wrongdoer, the Teamsters

[21] One significant distinction between this case and *Mead* should be pointed out to avoid confusion. In *Mead* the plaintiff contended that the entire strike was prohibited by § 8(b)(4)(D); if that position were sustained, it would be entitled to its total strike losses.

> Union, should suffer the consequences of the uncertainty being resolved against it."[22]

This proposition was sought to be supported by the authority of *Story Parchment,* its successor *Bigelow* v. *RKO Radio Pictures,* 327 U.S. 251, and related cases, in an elaborate discussion.[23]

The Court's opinion, holding that Morton could not recover for losses on the Wilson job because a plaintiff in a § 303 suit can recover only for damages proximately caused by a violation of § 8(b)(4) (377 U.S. at 261-262) tacitly rejected this argument. It would appear that the Court regarded it as too obvious to require comment that the requirement that the plaintiff show that his losses were "by reason of" a violation of § 8(b)(4) requires the plaintiff to prove the fact of proximate cause, and that this requirement is entirely consistent with the *Story-Bigelow* rule. For, as the present case illustrates, unless the plaintiff in a § 303 suit must prove the causal nexus between unlawful activity and strike losses, the plaintiff will be enabled to recover for losses caused by lawful activity and, if the decision is permitted to stand, the success of Great Coastal's strategy in submitting evidence of its total strike losses only, will provide a model and an incentive for other employers to similarly misuse the § 303 remedy.

[22] Brief for Respondent, No. 485, October Term 1963, pp. 16-17. Compare with the sentence beginning "The Teamsters Union introduced no testimony" the statement of the Court of Appeals herein: "The defendant had every opportunity, in the second trial as at the first, to contest both the proximate cause of the damage as well as its amount, and yet offered no evidence" (App. 31a).

[23] *Id.* pp. 17-23. Morton quoted the same passage from *Story Parchment* which we have set forth above, *id.* 17.

CONCLUSION

By reason of the foregoing this Petition for Certiorari should be granted.

Respectfully submitted,

SIDNEY DICKSTEIN
GEORGE KAUFMANN
1735 New York Avenue
Washington, D. C. 20006
Attorneys for Petitioner

APPENDIX

APPENDIX B

Statute and Rule Involved

Sections 8(b)(4)(B) and 303 of the Labor-Management Relations Act 1947 provide as follows:

Section 8(b(4)(B):

> (b) It shall be an unfair labor practice for a labor organization or its agents—
>
> * * *
>
> (4)(i) to engage in, or or induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise, handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—
>
> * * *
>
> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9 of this Act: *Provided,* That nothing contained in this clause (B) shall be construed to make unlawful where not otherwise unlawful, any primary strike or primary picketing;
>
> * * *
>
> *Provided,* That nothing contained in this subsection shall be construed to make unlawful a refusal by

any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this subchapter: *Provided further,* That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution

§ 303:

(a) It shall be unlawful, for the purpose of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 8(b)(4) of this Act.

(b) Whoever shall be injured in his business or property by reason or any violation of subsection (a) of this section may sue therefor in any district court of the United States subject to the limitations and provisions of section 301 of this Act without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit. (June 23, 1947, ch. 120, title III, § 303, 61 Stat. 158; Sept. 14, 1959, Pub.L. 86-257, title VII, § 704(e), 73 Stat. 545.)

APPENDIX C

Instances of Possible Secondary Boycott Activity Established by Plaintiff at First Trial

1. *Linoleum Distributors:* Charles Byrd, the owner of a Richmond wholesale linoleum distribution establishment, testified that in the latter part of October, 1970, he arrived at his place of business where his employees were refusing to unload a Great Coastal truck. Two strikers handed him a copy of the letter to customers and asked him not to unload the truck. They made no move to stop anyone from unloading the truck and moved off the premises at his request. Whereupon Mr. Byrd, the strike-breaking driver and Mr. Byrd's employees then unloaded the truck without interference (I JA 157-161). A Great Coastal replacement driver, Jimmy Shepherd, testified that prior to Byrd's arrival, striker Jack Beck asked the shipping foreman not to unload the truck (I JA 265-266). Byrd testified that his company, which was a consignee and not a shipper, did not thereafter request those who shipped goods to Linoleum Distributors not to ship via Great Coastal.

2. *Southern Special Products Corp:* Donald Guertin, the traffic manager of Southern Special Products Corporation, in Richmond, testified that within approximately a week after the strike began, he received the letter from Local 592's president, William Hodson, announcing the strike and requesting that he cease doing business with Great Coastal. Shortly after he received the letter, Guertin said he was visited in his office by Hodson and a Mr. Shelton, Local 592's business agent. They asked him if he was aware of the strike and said that "if I continued to use Great Coastal it would become necessary for them to place pickets

in the vicinity of the plant" (I JA 167). A few weeks later Southern Special Products ceased doing business with Great Coastal. Guertin testified that this was not because of the Hodson-Shelton visit, but was due to the request of his consignees (I JA 168, 170).

3. *Metal Bank of America:* A replacement driver, Samuel Rogers, testified that on one occasion in August 1970, soon after the strike started, he drove a Great Coastal truck to the Metal Bank of America in Philadelphia. He was followed by two strikers in a private automobile (I JA 193-194). When they arrived at their destination, the two strikers spoke to "the crane operator who was to unload us" informing him of the strike and requesting him not to unload the freight (I JA 196-198). Rogers testified that he had not since that time delivered any Great Coastal freight to the Metal Bank of America (I JA 198).

4. *The Milltown Paper Products Company:* Mr. Rogers also testified that on one occasion he "went up to Milltown up there where they make certain paper products" and that a roving picket asked the shop steward of the consignee not to unload the freight. The shipping foreman told Rogers to drop the trailer, that the employees of the paper company would unload it and that Rogers should return later to pick up the unloaded trailer (I JA 282).

5. *Little Falls Laundry:* A replacement driver, Jack Howell, testified that he once pulled up to the Little Falls Laundry in Little Falls, New Jersey with a truckload of freight, and that a number of strikers "hollered over there and told them not to give me any directions or any information because they were on strike" (I JA 232). At the time, Howell was engaged in conversation

to find out where to unload his freight (I JA 231). The load was not accepted (I JA 232).

6. *Mutual Paper Company:* A replacement driver, Robert Seward, testified that on one occasion when he attempted to deliver a load of freight to the Mutual Paper Company in Brooklyn, New York, two strikers "talk[ed] to people on the dock" after which the load was refused (I JA 247, 250).

7. *Hermetite Company:* A replacement driver, Jimmy Shepherd, stated that a load he was driving was once refused at the Hermetite Company in New Jersey following a conversation he did not overhear between a striker and a man variously described as a "shipping clerk," "foreman," and "shipping foreman" (I JA 264-265).

8. *Belwood:* A replacement driver, Mack Fifer, testified that once when he was driving in his private automobile to the Defense General Supply Center at Belwood to load a Great Coastal trailer left there the previous day, he observed striker Hubert Bailey near the Belwood gate (I JA 331). Fifer drove around trying to lose Bailey who was in a pickup truck, and then entered the Belwood installation and began loading the trailer (I JA 331-332). When he had partly completed his task, he was called into the office by someone and asked to cease loading the trailer and to leave the base (I JA 332-333). On his way out he observed a picket line and saw Mr. Hodson take the picket line down and wave to a truck parked at the gate (I JA 333).

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1371

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Petitioner,

v.

GREAT COASTAL EXPRESS, INC.,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

INDEX TO APPENDIX

APPENDIX A

Memorandum Opinion of District Court

(November 22, 1972)

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

RICHMOND DIVISION

Civil Action No. 5-71-R

GREAT COASTAL EXPRESS, INC.

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, etc.

MEMORANDUM

The International Brotherhood of Teamsters (hereinafter "Union"), pursuant to Rule 59, Federal Rules of Civil Procedure, has moved the Court for judgment *non obstante veredicto* (N.O.V.), as a consequence of a jury verdict rendered against it in excess of one million dollars. Both parties have exhaustively briefed the issues raised by the Union's motion, and it is upon said briefs and the record before it that the Court finds these matters ripe for disposition.

The plaintiff, a freight trucking corporation, originally brought suit in the Law and Equity Court of the City of Richmond in December of 1970, against the Union for alleged damages accruing from a protracted strike, accompanied by alleged widespread union violence and secondary boycotting. The original State court motion for judgment demanded $3,500,000 compensatory damages and $2,500,000

punitive damages. The defendant Union removed that action to this Court invoking jurisdiction pursuant to §§ 301, 303 of the Labor Management Relations Act (LMRA), 29 U.S.C. §§ 185, 187, and the removal statute, 28 U.S.C. § 1441(b). A jury trial was demanded.

In November 1971 the plaintiff submitted a trial brief whereby it specified causes of action for compensatory and punitive damages under LMRA § 303 (29 U.S.C. § 187) and the common (tort) law of Virginia respectively. In response, the Union's trial brief raised issues with respect to the § 303 claim, which issues are the gravamen of the present motion, and averred that plaintiff's common law tort claim was not substantiated by a clear showing of the International Union's (defendant) participation in the alleged tortious activity as required by § 6 of the Norris-LaGuardia Act, 29 U.S.C. § 106 and *United Mine Workers* v. *Gibbs,* 383 U.S. 715 (1965).

Upon completion of plaintiff's case at trial, the defendant Union moved for a directed verdict. The motion was granted with respect to the violence (common law) claim, the Court having concluded that the plaintiff had not sustained the burden of producing a clear showing of the defendant's participation in that regard as required by the statutory law and the principles of *Gibbs, supra.*

A directed verdict for the Union with respect to the secondary boycott claim was, however, denied. The Court, though satisfied that the oral testimony adduced was insufficient to sustain a finding of agency between the strikers and the defendant Union, concluded that it was bound as to that issue by the principles enunciated by its appellate court in the case of *International Brotherhood of Teamsters* v. *United States,* 275 F. 2d 610 (4th 1960), discussed *infra,* and accordingly permitted the secondary boycott claim to go to the jury.

Upon summation to the jury, plaintiff's counsel averred that it had shown actual damages proximately resulting from the alleged secondary boycotting in the amount of

$942,065.00. In the course of its deliberations, the jury inquired of the Court, "What amount of damages lost in dollars is the plaintiff asking? Is it the $942,065 figure?" After colloquy with counsel, the Court instructed the jury, "The direct answer to that inquiry is yes . . . I must tell you that you are not to concern yourselves with what the plaintiff asks for unless it coincides with the evidence as you find it." The jury subsequently returned a verdict for $1,300,000.00.

The Union has predicated its motion for judgment N.O.V. on a number of grounds, many of which deal with matters best left for appellate review.[1] The Court is duty bound, however, to consider several of the issues raised thereby, which may be delineated as follows:

1. Was there a requisite showing of agency made by the plaintiff by which the defendant, the parent union, could be held accountable for acts of its members and/or local affiliates?

2. Was the jury finding of damages made in accordance with the mandate of LMRA § 303?

3. Were charges to the jury of such a contradictory nature so as to be confusing or otherwise an impediment to impartial jury deliberation?

Considering these issues in turn, the Court concludes as follows:

---

[1] The defendant has averred that insufficient evidence of secondary boycott activities was presented to sustain a jury verdict therefor. Much of defendant's contention rests upon the proper legal definition of the secondary boycott alleged here. The Court is of the opinion that its determination of these legal issues is clearly set forth in the jury charge and that factual determinations with regard to proof of alleged illegal activity were properly made by the jury. Except for the question of contradiction in said charges, the Court will not consider that issue.

I.

The labor dispute at issue here began as a wildcat strike and was subsequently adopted by three Teamster locals. The defendant admits supplying strike benefits to its members and to providing $10,000 to the depleted treasury of one of the locals involved. The defendant also admits that one of its officers solicited help for the locals involved from its other, non-involved affiliates. The defendant with some force asserts that the above acts do not establish the requisite agency on which to predicate liability for illegal strike activities. The Court's initial inclination to sustain these contentions was, as heretofore stated, precluded by its interpretation of the rule of *International Brotherhood of Teamsters* v. *United States, supra* (hereinafter "IBT"). Upon restudy of this matter and of the *IBT* case, the Court concludes that *IBT* binds the Court to the determination that requisite agency was here present.

In that case, a criminal contempt action was brought against the present defendant. The defendant therein challenged the service upon an officer of a union local, contending that said service was ineffective against the defendant International Union. The issue thus formed was whether the local officer was properly an agent of the International Union. In making its determination, the Court of Appeals for this circuit closely examined the constitutional provisions of the defendant's charter. Based upon a thorough examination of the provisions of that constitution, in an opinion by Judge Haynsworth, the Court stated that to find that the local official was not an agent of the parent union could not "be squared with realism." This conclusion was based on the parent's far-reaching control of the local, as shown by the provisions of the International Constitution bearing upon such control of many details of its business and operations. The Court further concluded that its finding was buttressed by the fact that the local involved therein was then under trusteeship. It appears from the Court's reasoning, however, that the status of

trusteeship was not, as defendant has argued, the determinative factor in the Appellate Court's conclusion.

Because the Teamsters ratified a new Constitution in July 1966, (after *IBT* but prior to the event complained of here), the Court must determine whether the new provisions would result in determinations in accord with those in *IBT*. The provisions with regard to membership are similar. People eligible to be local members are automatically eligible to be International members. Exceptions to this rule may be made by the International's General President. As in *IBT*, the International's Constitution prescribes monthly local meetings and the rules of procedure therefor. The General President or General Secretary-Treasurer of the parent union has the power, upon approval of the General Executive Board, to revoke a local charter. Local charters are issued by the parent union. The Trusteeship provisions are also similar. More important, as in *IBT*, the International must approve contemplated job actions by local affiliates, and has the power to override local executive board decisions with respect to acceptance of contract terms and job actions by directly submitting the issue to a vote of the local. Without making further detailed findings as to the specific operations of the International-local framework, it will suffice for the Court to state that the two constitutions are so similar as to bring the current set-up within the rationale of *IBT*.

The Court must conclude, therefore, that as a matter of law the jury was entitled, upon appropriate findings of fact, to impute the actions of various locals and individual members to the parent union.

II.

The Union claims that the jury determination as to damages is violative of the LMRA § 303, upon which the Union's liability is founded. The Court concludes that this view is well taken.

The Supreme Court made clear in *Local 20, Teamsters' etc. Union* v. *Morton,* 377 U.S. 252 (1964), that § 303 is addressed only to illegal strike activity and that any liability predicated upon that section must be confined to actual, compensatory damages. Punitive damages are not within the contemplation of that section.[2] The damages must flow from injuries proximately caused by the illegal secondary activities under § 303.

Upon trial, the plaintiff's counsel in argument claimed to have shown actual damages resulting from the secondary boycotts in the amount of $942,065. As the above-recited facts indicate, the jury was well aware of this figure. Nevertheless it returned a verdict of $1,300,000. The Court is aware that "once the fact of damage has been properly shown, 'uncertainty as to their amount will not foreclose recovery.'" *Riverside Coal Co.* v. *U.M.W.,* 410 F.2d 267 (6th Cir. 1969). The Court is also cognizant of the fact that the protracted length of the strike here involved (seven months) as well as the widespread geographical union strike activities make it extremely difficult to establish an exact figure for actual damages, and that accordingly, the jury is given some latitude under *Riverside Coal.* Nevertheless, the damage award here was substantially out of touch with damages allegedly proven. Although the plaintiff has sought to justify the award here with further figures of subsequent business losses, that evidence was not before the jury. Under *Morton, supra,* this award cannot be left to stand.

The Court is of the further opinion that the jury, while well intentioned, was in spite of the Court's instructions to the contra influenced in its consideration of damages by the gross and vicious conduct attributed to the members of the local union and their sympathizers. This is reflected

[2] Punitive damages for non-peaceful secondary activity may be awarded on a state claim under pendent jurisdiction. See *UMW* v. *Gibbs, supra.* However, in this action the plaintiff failed to sustain a state law cause of action.

in its verdict which exceeded even the claims of plaintiff's persuasive advocate by more than $300,000.00.

The question remains, therefore, as to the appropriate remedy. While there is proper precedent under § 303 for a remittitur up to 40%, see *Gulf Coast Bldg. & Const. Tr. Council* v. *Hoar & Son,* 370 F.2d 746 (5th Cir. 1967), the Court concludes that in this case, owing to the complicated nature of the damage question, that a remand for new jury determination as to damages is appropriate. See *Carpenter's Local 1273, etc.* v. *Hill,* 398 F.2d 360 (9th Cir. 1968).

III.

The Union alleges that portions of the jury charge were of such a contradictory nature as to be improperly confusing to the jury. Specifically, it alludes to the two passages, denoted by brackets below, which deal with the definition of the strike activities complained of. The Court has contextualized these passages by adding intervening portions of the charge:

> [The other type of legal primary activity, strike activity, is called roving or ambulatory picketing. Now, this type of picketing permits the union to picket beyond the terminal, warehouse, or other buildings belonging to Great Coastal. It allows the union to follow and picket Great Coastal trucks while they make pick-ups and deliveries. And in this type of picketing the union must conform to certain rules. Briefly summarized these rules permit the union to picket at the time when a Great Coastal truck may be located on the premises of a Great Coastal customer and is engaged in its normal trucking business at its customer's place of operation.
>
> The rules permit picketing by the union providing such picketing is reasonably close to the Great Coastal truck and permits picketing where a Great Coastal truck is present at the premises of a Great Coastal customer

provided the union discloses that its dispute is only with Great Coastal and not its customer.

Now, you heard a great deal of testimony and discussion and argument about the legality or illegality of ambulatory picketing. About whether that picketing is rendered illegal if the union hopes that the employees of Great Coastal's customers will honor its picket lines. You are specifically instructed that the ambulatory picketing is not in and of itself illegal. *Nor is it rendered illegal by the fact that the union may have hoped and desired that the employees of Great Coastal's customers would honor the picket lines.* Ambulatory picketing, which is confined as reasonably as possible to the vicinity of the Great Coastal truck and to the time when the Great Coastal truck was present on the premises is presumptively legal.] (Emphasis supplied by defendant).

• • • • •

Section 303(a), 29 U.S.C.A. 187(a) provides, and I quote, "It shall be unlawful, for the purpose of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in Section 158(b)(4) of this Title."

Section 158(b)(4) defines an unfair labor practice as follows: *"It shall be unfair labor practice for a labor organization or its agents to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services;* or to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, *where in either case an object thereof is (B)*

forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of Section 159 of this Title: provided, that nothing contained in this clause shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing." (Emphasis supplied by Court).

• • • • •

[The words "induce or encourage" are broad enough to include in them every form of persuasion. Pickets and picket signs are a form of persuasion used by unions. And if you find that the union picketing at places of business of the plaintiff's customers was intended to appeal to employees of those customers to induce or encourage them to engage in strikes or refusal to handle the plaintiff's freight, and if you further find that one of the objects thereof was to cause such customers to cease doing business with the plaintiff, you will answer the first issue yes.

• • • • •

In determining any issue involving the intent or object of the union you may consider all the facts and circumstances in evidence in the case which may aid the jury in its determination of the states of mind of the union's representatives in this case.

The Court tells you it is not necessary that the evidence in this case establish that the only object or purpose of intent of the defendant union with respect to the employees or persons doing business with the plaintiff

was to require or force them to cease doing business with the plaintiff. A labor organization may have many different reasons for communicating or dealing with the employees of a business concern, and all of these reasons may in varying degrees prompt the conduct of the union with respect to such employees. It is sufficient if one of the objects or purposes of the defendant union in any communication or dealing with the employees of customers or the plaintiff was to require or force such customers to cease doing business with the plaintiff.]

The Union alleges that the two bracketed portions cannot be reconciled. Upon proper contextualization of these passages, the Court disagrees. The first bracketed passage deals with the definition of *primary* ambulatory picketing and states that legal primary picketing is not rendered illegal by union members' ultimate desires. See *Local 761 IUE* v. *NLRB*, 366 U.S. 667 (1961). The second bracketed passage is a definitional discussion of § 303(a) which proscribes, *inter alia*, *secondary* picketing. See *Local 761, IUE, supra*. The two passages are uncontradictory. Any ambivalence which is produced by the juxtaposition of these passages is merely caused by the fact that, "Important as is the distinction between legitimate 'primary activity' and banned 'secondary activity' it does not present a glaringly bright line." *Local 761, IUE, supra*, at 673. The Court is satisfied its statement of the law as given to the jury was accurate.

The defendant takes exception as well to jury charges on the question of damages. In light of the Court's aforementioned determination in that regard, said exceptions are rendered moot.

The motion for judgment N.O.V. will be denied. The Court will strike the jury award on damages and direct a retrial solely as to that issue.

An appropriate order shall enter.

/s/ Robert R. Merhige, Jr.

Robert R. Merhige, Jr.
United States District Judge

Date: Nov. 22, 1972

APPENDIX B

District Court Order
Granting New Trial Limited to Damages
(November 22, 1972)

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

RICHMOND DIVISION

Civil Action No. 5-71-R

GREAT COASTAL EXPRESS, INC.

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, etc.

ORDER

For the reasons stated in the memorandum of the Court this day filed, and deeming it proper so to do, it is ADJUDGED and ORDERED that the motion of the defendant for judgment notwithstanding verdict or for remittitur be, and the same is hereby, denied.

The verdict of the jury as to the amount of damages be, and it is hereby, set aside, and a new trial limited to damages is hereby ORDERED.

The Court notes the objection and exception of each of the parties to its rulings herein, for the reasons stated in their respective memoranda heretofore filed.

/s/ ROBERT R. MERHIGE, JR.

Robert R. Merhige, Jr.
United States District Judge

Date: Nov. 22, 1972

APPENDIX C

District Court Judgment
(April 20, 1973)

UNITED STATES DISTRICT COURT

FOR THE

EASTERN DISTRICT OF VIRGINIA

RICHMOND DIVISION

Civil Action File No. 5-71-R

GREAT COASTAL EXPRESS, INC.

VS.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, an unincorporated association

---

JUDGMENT

This action came on for trial before the Court and a jury, Honorable Robert R. Merhige, Jr., United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

It is Ordered and Adjudged that the plaintiff, GREAT COASTAL EXPRESS, INC., recover of the defendant, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, the sum of EIGHT HUNDRED SIX THOUSAND NINETY-THREE ($806,093.00) DOLLARS,

with interest thereon at the rate of six (6) per cent per annum as provided by law, and its costs of action.

/s/ W. Farley Powers, Jr.

W. Farley Powers, Jr.
Clerk of Court

Dated at Richmond, Virginia, this 20th day of April, 1973.

A true copy—Teste:

Clerk, U. S. District

APPENDIX D

District Court Order Denying Motion for Judgment N.O.V. or for a New Trial (November 7, 1973)

In the

UNITED STATES DISTRICT COURT

For the Eastern District of Virginia

Richmond Division

Civil Action No. 5-71-R

Great Coastal Express, Inc.

v.

International Brotherhood of Teamsters, etc.

ORDER

Deeming it proper so to do, it is Adjudged and Ordered that the motion of the defendant for judgment non obstante veredicto, as well as defendant's alternative motion for a new trial, be, and the same are hereby, denied.

It is further Adjudged and Ordered that the Court's order of May 11, 1973, staying enforcement of the judgment entered herein under date of April 20, 1973, be, and the same is hereby, vacated.

Let the Clerk send copies of this order to all counsel of record.

/s/ Robert R. Merhige, Jr.

Robert R. Merhige, Jr.
United States District Judge

Date: 11-7-73

APPENDIX E

Opinion of Court of Appeals (January 21, 1975)

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 73-2393

No. 73-2448

GREAT COASTAL EXPRESS, INC.,

Plaintiff-Appellee-Cross Appellant,

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, an unincorporated association,

Defendant-Appellant-Cross Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, AT RICHMOND.
ROBERT R. MERHIGE, JR., DISTRICT JUDGE.

Argued April 3, 1974 Decided January 21, 1975

Before:

RUSSELL, FIELD and WIDENER,

Circuit Judges.

• • •

WIDENER, Circuit Judge:

This suit originally filed in a Virginia state court, was removed to federal district court pursuant to 28 U.S.C.

§1441(b) as a claim arising under §§ 301 and 303 of the Labor Management Relations Act, 29 U.S.C. §§ 185 and 187.

This appeal results from two jury trials in which the appellant-defendant union, International Brotherhood of Teamsters, etc. (IBT), was found to have been responsible for damages resulting from illegal secondary boycotts conducted by three of its local unions in violation of 29 U.S.C. § 158(b)(4).

The employer, Great Coastal Express, Inc. (the company), contended throughout both trials that all of its damages, alleged to be $942,065, resulted from the illegal acts of IBT because the company had not suffered damage until IBT supplemented its legal tactics with illegal ones. The first jury returned a general verdict against IBT for $1,300,000, which the district court set aside on IBT's motion for judgment *non obstante veredicto*, or in the alternative for a new trial, as being excessive. See 350 F.Supp. 1377 (E.D. Va. 1972). A new trial was ordered to reconsider the issue of damages, and the verdict reached at the second trial was for $806,093, upon which the district court entered judgment.

IBT contends on appeal that the court wrongfully allowed the issue of whether or not the local unions, and their officers and members, were the agents of IBT to go to the jury in the first trial; that the company should not recover any damages because it failed to particularize its losses to those caused by illegal activity as distinguished from losses caused by legal union activity; that the court erred in restricting the second trial to damages; and that the instructions to the second jury were erroneous. For reasons which follow, we affirm the judgment of the district court. Because of our resolution of the case, it will not be necessary to reach the issue of the violent conduct of the unions raised on cross appeal by the company.

The company is an interstate truck common carrier, based in Richmond, whose business consists primarily of transporting general commodity freight from twenty-six

Virginia counties into New Jersey and parts of New York, Connecticut and Pennsylvania. The company had been a party to the National Master Freight Agreement with IBT from 1964 until expiration of the 1967 contract on March 31, 1970. The parties reached an impasse during negotiations for a new contract, and the company refused to become a party to the new National Master Freight Agreement. Richmond Local 592 applied for strike benefits from IBT on August 6, 1970 and went on strike August 9, 1970. IBT approved payment of the strike benefits on August 10, 1970, and, on August 13, Local 107 in Philadelphia and Local 641 in Jersey City, New Jersey also went on strike against the company. Retroactive strike benefit payments were also approved by IBT for the latter two locals. All three locals were striking over the company's refusal to become a party to the National Master Freight Agreement, and no contention is made that the cause for the strike was not quite a legal reason.

The strike initially had little or no effect on the company. It was able to continue all its operations by using office employees, salesmen, supervisors, and newly-hired replacement drivers. Employees not on strike willingly crossed union picket lines at Richmond, and the company began making direct pickups and deliveries in its northern territories so that the picketed Jersey City terminal was practically unused. At the end of the seven or eight month continuance of the strike, however, the company's freight-hauling business had been effectively shut off. The argument between the parties is over the legality of a roving picket operation, and the extent to which illegal secondary boycott activities damaged the company.

The company's attack in the first trial was two-pronged, in that it sought damages for alleged secondary boycott activities in violation of LMRA § 303, 29 U.S.C. § 187, and also damages for various alleged acts of violence and sabotage. At the close of the company's evidence, the court granted defendant's motion for a directed verdict as to the

violence aspect of the case, holding that the burden of proof for finding IBT liable for acts of violence committed is the higher standard of proof of clear and convicing evidence, rather than a preponderance, and that the company had failed to meet this higher standard. See *U.M.W.* v. *Gibbs*, 383 U.S. 715, 735 (1966), construing Norris-LaGuardia Act, § 6, 29 U.S.C. § 106.

We should say here, and we emphasize, that the union does not contest the fact that there was evidence from which a jury could find an illegal secondary boycott. Indeed, the matter is admitted to be clearly a jury question. And the matter having been decided in favor of the plaintiff under proper instructions, it is, in all events, removed from our consideration. *Lavender* v. *Kurn*, 327 U.S. 645 (1946). The only question before us as to that finding is whether or not a partial new trial was proper.[1]

The company offered evidence as to illegal secondary activities by representatives of customers it had serviced during the strike, and drivers it had hired to replace the strikers, as well as from its own executives and other employees and the president of the Richmond local and an international director of the union.

The principal witness concerning the amount of the company's damages was a Certified Public Accountant, Lepp, who testified that he had worked with Great Coastal for several years and had examined the books of Great Coastal for periods before, during and after the strike. Lepp stated that he noted a disruption in the company's general pattern of receipts and profits after the strike started. On the basis of the company's business growth pattern and operating ratio over a period of time prior to the strike, Lepp projected a figure of anticipated profit during the seven months of the strike as being $322,438. He added to this the

[1] There is a question of some consequence as to whether or not this argument was properly presented to the district court so that it might be argued here. *McGowan* v. *Gillenwater*, 429 F.2d 586 (4th Cir. 1970). We do not reach this procedural question.

actual loss incurred by the company during the strike, $274,895, to reach a total damage figure of $597,333 during the strike. Lepp then computed a projected profit figure of $495,715 for the period from the end of the strike to the end of 1971, subtracted $150,983 actual profit which the company showed in this post-strike period, and added the additional damage figure of $344,732 to $597,333 in arriving at the total damage estimate of $942,065.

The key witness for IBT with respect to union activity after the strike began was William A. Hodson, president of the Richmond Local No. 592. Hodson testified that he generally was in charge of the strike, and was personally involved in the picketing on occasion. The union began utilizing roving, or ambulatory, pickets to follow company trucks to customer business locations, and Hodson testified that these pickets were assigned on a weekly basis to go throughout the company's territory. All of the roving pickets' expenses were paid, in addition to strike benefit payments, by the union; Hodson testified that over $49,000 in strike benefits were paid, and that Local 592 had also received $10,000 from IBT, $10,000 from the Eastern Conference of IBT, and $2,500 from various Joint Councils of IBT, apparently in addition to authorized strike benefits, to further assist in financing the strike.[2] Hodson sent a letter to all of the company's customers, advising them that Local 592 was on strike against Great Coastal because of its unfair labor practices, expressing a desire to lawfully picket on their premises when Great Coastal trucks were present, and requesting their cooperation during the strike. He further testified that a purpose of the roving pickets was to receive assistance or cooperation from the company's customers, and that he had complained to IBT about sister Teamster locals, not employed by the company, who

[2] Although the matter is unclear from the evidence presented, the $49,000 figure apparently includes all union monies, from whatever source within the union, expended on the strike. IBT records introduced in evidence show that it paid $24,160, as authorized strike benefits, to individual strikers.

refused to respect their picket lines. At the first trial he admitted that a purpose of the roving pickets was to induce employees of Great Coastal customers not to unload Great Coastal freight, and at the second trial he admitted such was their primary purpose. Taken as a whole, Hodson's testimony left little doubt that Local 592 tried to get all IBT local unions, whether they represented Great Coastal employees at other locations or not, to assist in this strike in refusing to unload Great Coastal freight, and that non-teamster unions had also been asked to help.

Evidence, in addition to Hodson's testimony, indicated that Local 592 kept close contact during the strike with both the Eastern Conference of IBT and IBT headquarters itself, and that almost all of Local 592's requests for assistance, financial or otherwise, were complied with. IBT was advised on numerous occasions of the existence of the roving pickets. On one occasion, Eastern Conference director and IBT director and vice president Trerotola wrote to over 100 other teamster locals advising them that the roving pickets had not been entirely successful and requested any assistance they could legally give. He enclosed a list of Great Coastal customers.

The gist of Trerotola's testimony as to IBT's involvement and assistance during the strike may be summarized in short order; Trerotola stated consistently that he was a busy man, that it was his signature on various letters written to Local 592 and IBT, but that he did not specifically recall signing the letters because of the bulk of correspondence his office receives and the fact that he delegates many responsibilities. He said the Eastern Conference may have assisted Local 592 in getting various correspondence mailed and in obtaining contributions to its strike fund; that IBT often asked other unions to help in any way they could; and that he had requested only lawful assistance from other teamster locals. He said he had no knowledge of any illegal secondary activity in connection with this strike.

The district court's opinion on the motion for judgment *non obstante veredicto* following the first verdict of $1,-

300,000 is reported at 350 F.Supp. 1377. IBT raised the same issue in that motion as here with respect to whether the company had made the requisite showing of agency, and also argued that the jury charges were contradictory, and that the jury had awarded punitive damages in violation of the Labor Management Relations Act, § 303. The court relied on the case of *International Brotherhood of Teamsters* v. *United States,* 275 F.2d 610 (4th Cir. 1960), in concluding that there had been a sufficient showing of agency to let the jury consider it. The court also ruled against IBT on the jury charge issue, but did hold that the excessive verdict of damages was partially caused by the jury's consideration of the gross and vicious conduct attributed to the members of the local union and their sympathizers. The court stated the damage question was complicated and concluded a remittitur was improper. The motion for judgment N.O.V. was then denied, and a retrial ordered on the issue of damages.

At the second trial, the company relied primarily on testimony of its president and vice-president, who testified at length concerning the deterioration of company business and loss of customers, and Lepp's testimony concerning the $942,065 damages claimed. IBT called no witnesses. Pertinent exhibits from the first trial were introduced by both sides for the jury to consider in arriving at damages. The company again took the position that no damage had been caused until the unlawful secondary boycott commenced. A part of the uncontradicted evidence was that numbers of freight shipments went undelivered because of the illegal secondary boycott actions. The jury concluded that the company proved damages of $806,093.

IBT's first contention, that the court should have ruled as a matter of law that there was insufficient evidence for the jury to find an agency relationship between it and the striking local unions, is without merit. The Supreme Court has recognized, in suits brought under the LMRA § 303, that the responsibility of a union for the acts of its officers

and members "is to be measured by reference to ordinary doctrines of agency." *United Mine Workers* v. *Gibbs,* 383 U.S. 715, 736 (1966). This court has previously held, in another context (a criminal case with its more stringent burden of proof), that the IBT constitution provides for such far-reaching control of local unions that the locals, in essence, are not autonomous but are subdivisions of IBT. *International Brotherhood of Teamsters* v. *United States, supra,* at 614. The district court here compared the constitution in effect when the *Teamsters* case was decided, found no significant differences, and concluded, quite correctly, that under the evidence in this case the jury was entitled to decide the issue. 350 F. Supp. at 1379. That being so, the issue is closed, for the weight of the evidence and the credibility of witnesses is solely within the province of the jury. *A. & G. Stevedores* v. *Ellerman Lines,* 369 U.S. 355, 358-59 (1962); *Lavender* v. *Kurn,* 327 U.S. 645, 652-53 (1946). IBT claims no error as to the evidence admitted, which was ample to show participation by IBT, or in the jury charge, so the jury's finding of an agency relationship must stand.

The above discussion as to agency applies in large part to the jury finding that IBT had committed illegal secondary acts. As stated before, the defendant admits this was a jury question. The court, at the first trial, very carefully charged the jury as to the law concerning secondary boycotts, and IBT does not contest the charge on appeal. From the testimony and other evidence recited, it goes without saying that the jury had abundant evidence to find that IBT had induced, encouraged, threatened, or coerced employees of Great Coastal customers to withhold the labor from their employers, with whom they had no dispute, and that IBT so acted for the purpose of achieving the unlawful objectives set out in the National Labor Relations Act, § 8(b)(4), 29 U.S.C. § 158(b)(4). The record also contains abundant evidence from which the jury could have found, as it obviously did, that almost every truck of Great Coastal was

followed by roving pickets from the inception of the strike; that initially they were to little or no avail; that after requests of Trerotola and Hodson were made to the other unions the roving pickets became almost completely effective because the employees of the consignees would not accept delivery from Great Coastal; and on account of the illegal secondary boycott activities Great Coastal was damaged.

The thrust of IBT's complaint concerning the second trial, though, is not the sufficiency of the evidence, but that the company should have separated union activity that was clearly lawful, and for which no damages could be had, from the alleged unlawful activities, and thus established the proximate cause of its damages with more specificity. The company's theory throughout both trials was that it had suffered no damages at issue here because of lawful union activity, but that all of such damages resulted from IBT's unlawful acts which ultimately shut down business entirely.

What IBT does not take into account is that at the second trial, the trial judge, out of an abundance of precaution, submitted not only the amount of damages, but also the proximate cause thereof to the jury. Thus, there were the two issues tried at the second trial, not only the issue of the amount of damages.

The judge again correctly charged the jury which ambulatory picketing activities were lawful, and which were unlawful, and, among several references to proximate cause in his charge which required the company to prove its damages were proximately caused by the unlawful activities of the union as contrasted to the lawful, told the jury:

> "You understand, of course, that you may not award the plaintiff damages simply because of lost money during the strike or for money lost as a result of the union engaging in legal and permitted activity. In a strike situation, infliction of losses both upon the union and the employer is to be expected. It is not an occasion for liability unless the losses resulted from illegal strike activity. For this reason, you may only award damages where Great Coastal has proved by a preponderance of the evidence that it was so damaged."

We think this case is not one where the plaintiff should be faulted out of its judgment for not proving its damages with more exactness and precision. The Supreme Court has held, in an anti-trust case, that where the amount of damages cannot be ascertained with certainty, "it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts." *Story Parchment Co.* v. *Patterson Parchment Co.*, 282 U.S. 555, 563 (1931). This circuit has previously adopted the *Story Parchment* reasoning in an action under 29 U.S.C. § 187 very similar to the one at hand. *United Mine Workers* v. *Patton*, 211 F.2d 742 (4th Cir. 1954). IBT's contention that *Local 20, Teamsters Union* v. *Morton*, 377 U.S. 252 (1964), would mandate a contrary result is not well founded, for *Morton* was a completely different case. In *Morton*, the district court, sitting without a jury, awarded the plaintiff $9,000 damages, under state law as a pendent claim, for loss of one of its customers, as a part of plaintiff's total damages. The customer had been persuaded by the union to cease doing business with the plaintiff, but its employees had not been approached. The Supreme Court held that the district court had no power to award damages proximately caused by such lawful, primary activities, since permitted by federal law, even though state law would have allowed a recovery in such a case. 377 U.S. at 259-60. Along the same line, the court set aside the judgment for loss of certain customers whose business had been discouraged because of the strike, but who were not affected by any unlawful activity, because the union should not be responsible for damage by lawful activity even though it may have been engaged in unlawful activity elsewhere. 377 U.S.

at 261-62. But the court sustained the judgment of the trial court for damages for unlawful secondary boycott activities, the district court having in its opinion separated the items of damage.

In this regard, IBT argues that the court should have required a special verdict from the jury. F.R.Civ.P. 49 gives district courts broad discretion in determining the form of verdict. While we have no occasion here to decide whether the district judge has uncontrolled discretion in this regard,[3] we do note that there apparently has never been a reversal for abuse of discretion in determining the form of verdict.[4] We hold, with *Toth* v. *Corning Glass Works,* 411 F.2d 912, 914, n. 2 (6th Cir. 1969), that where the complaining party made no request for a special verdict to the trial court, it cannot raise the issue for the first time on appeal. Since IBT acceded to the general verdict without complaint in both trials in the court below, it may not now assign error in the district court's submission of the issues by way of general verdict.

Turning now to the issue of whether a partial new trial was appropriate, we note that such is expressly permitted by F.R.Civ.P. 59(a). The principal case with respect to ordering a new trial as to damages only is *Gasoline Products Co.* v. *Champlin Co.,* 283 U.S. 494 (1931). The court, in *Gasoline Products,* held "that, where the requirement of a jury trial has been satisfied by a verdict according to law upon one issue of fact, that requirement does not compel a new trial of that issue even though another and separable issue must be tried again." 283 U.S. at 499. The court then proceeded to analyze the contracts in dispute to determine whether the damages and liability issues were separable, and concluded that, although the verdict on the contract

[3] See *Skidmore* v. *Baltimore & Ohio R.R.,* 167 F.2d 54, 66-67 (2nd Cir. 1948), cert. den. 335 U.S. 816 (1948).

[4] 9 Wright and Miller, *Federal Practice and Procedure,* Civil § 2505, p. 492; 5A Moore's *Federal Practice,* 2d Ed., 1974, ¶ 49.03 (1), p. 2208.

sued upon by the plaintiff was affirmed, since the first verdict on the counterclaim was for less than the total damages claimed on various contracts, the extent of the damages depended on the extent of the undertakings which were in dispute, and the issues were so interwoven that a second jury could not fairly consider damages alone in a new trial on the counterclaim. And, it is noteworthy that the court did separate and let stand the verdict for the plaintiff on the contract sued upon without a new trial.

This court has considered new trials limited to damages on several occasions since the *Gasoline Products* case. It is well settled that granting or denying a new trial, either for excessiveness or inadequateness of the verdict, is discretionary with the trial court, and not reviewable absent a showing of abuse of discretion. *Young* v. *International Paper Co.,* 322 F.2d 820, 822 (4th Cir. 1963). Most of the cases considered by this court have concerned the district court's discretion in ordering a partial new trial for inadequate damages, but the same general principles apply whether the verdict is attacked either for inadequacy or excessiveness. *DeFoe* v. *Duhl,* 286 F.2d 205 (4th Cir. 1961) (citing Virginia law); see *Note,* 29 A.L.R.2d 1202 (on inadequacy). The only case where a new trial on all issues was suggested because of excessive damages was *United Construction Workers* v. *Haislip Baking Co.,* 223 F.2d 872 (4th Cir. 1955), cert. den., 350 U.S. 847 (1955).

In *Haislip Baking,* an action based on 29 U.S.C. § 185(b), it is true the court stated that "[t]he verdict on the first trial was so excessive and so manifestly based on improper consideration, instead of upon the record, that it should have been set aside in its entirety and a complete new trial ordered," but the court then proceeded to direct entry of judgment for the defendant instead of remanding for a new trial. The jury in that case had erroneously not been instructed on mitigation of damages and had erroneously been allowed to consider the parent union as responsible for a wildcat strike. It was this latter consideration the

court referred to in its reference to the record. Neither consideration is present here, and even considering the above quoted statement from *Haislip* as a holding, it does not control the disposition of this case.

In another Fourth Circuit case involving excessive damages, the trial court ordered a remittitur instead of a partial new trial. *Ford Motor Co.* v. *Mahone,* 205 F.2d 267 (4th Cir. 1953). This court reversed and ordered a new trial as to all the issues when it was found that one of the jurors had obvious partisan bias in favor of one of the parties, and this in a "hotly contested" trial as to both liability and damages which resulted in a verdict the court found based on pity and sympathy. Likewise, that problem is not presented in this case.

This court has noted that there is "always a presumption in favor of the validity of a verdict if it is the result of honest judgment," *City of Richmond* v. *Atlantic Co.,* 273 F.2d 902, 916 (4th Cir. 1960), but has found a new trial on all issues to be required where a totally inadequate verdict was rendered which could only have been a sympathy or compromise verdict. *Southern Railway* v. *Madden,* 235 F.2d 198 (4th Cir. 1956), cert. den., 352 U.S. 953 (1956). But where there is no substantial indication that the liability and damage issues are inextricably interwoven, or that the first jury verdict was the result of a compromise of the liability and damage questions, a second trial limited to damages is entirely proper. *Young* v. *International Paper Co., supra; Mason* v. *Mathiasen Tanker Industries, Inc.,* 298 F.2d 28 (4th Cir. 1962), cert. den., 371 U.S. 828 (1962).

The matter of a partial new trial has been frequently considered since *Gasoline Products* and its subsequent articulation in F.R.Civ.P. 59(a), and one of the leading texts states that it "may be regarded as settled that if an error at the trial requires a new trial on one issue, but this issue is separate from the other issue in the case and the error did not affect the determination of the other issues, the scope of the new trial may be limited to the single issue."

11 Wright & Miller, *Federal Practice and Procedure, Civil* (1973), p. 93; see also Moore's *Federal Practice,* 2nd Ed., 1974, ¶ 59.06. And, we have held in *Young* v. *International Paper Company, supra,* that the action of a district judge in setting aside a verdict as to damages, and at the same time refusing to set aside the same verdict as to liability, should be affirmed unless the district judge abused his discretion.

In short, our task here is to determine whether the district court's conclusion that the first verdict was based on honest judgment by a well-intentioned jury, and that the liability and damage issues were not inextricably intertwined, so that a partial new trial was fair to both parties, was an abuse of discretion, and whether the presumption of the validity of the verdict has been overcome. IBT argues that the evidence of violence heard by the jury, before the court directed a verdict against the company as to that issue, so inflamed the jury, and caused them to render a verdict in excess of damages proven, that the entire verdict was tainted. We cannot agree. The court charged the jury that no acts of violence testified to could be considered in assessing any damages, and that damages were limited to losses which flow proximately from any illegal activity the jury might find. During deliberations, the jury inquired of the court, "What amount of damages lost in dollars is the plaintiff asking? Is it the $942,065 figure?," to which the court responded ". . . yes . . . I must tell you that you are not to concern yourselves with what the plaintiff asks for unless it coincides with the evidence as you find it." 350 F.Supp. at 1378. It is obvious from the foregoing that the jury did not consider the $942,065 as a limiting figure, but we are unable to say from the record that the excessive verdict was caused from anything more than a misunderstanding of the jury charge as not limiting the recovery to pecuniary loss as mentioned in the question asked the court. There is no basis to support the defendant's contention that the first verdict was fatally infected by prejudice.

To hold otherwise would be speculation on our part as to what the jury considered in its deliberations, and this we should not do, for, in the words of Mr. Justice Brandeis, "[a]ppellate courts should be slow to impute to juries a disregard of their duties, and to trial courts a want of diligence or perspicacity in appraising the jury's conduct." *Fairmount Glass Works* v. *Cub Fork Coal Co.*, 287 U.S. 474, 485 (1933). Since no error is alleged as to any of the evidence, jury charges, or other relevant proceedings during the first trial, and especially considering the admitted and abundant evidence as to illegal secondary boycott activities, we are of opinion that the presumption in favor of the validity of the first verdict, insofar as it applies to the finding of IBT's liability, has not been overcome. *City of Richmond* v. *Atlantic Co., supra.*

Nor are we able to agree that the issues of liability and damages were so closely intertwined that the second jury should not consider the issue of damages apart from liability. The jury in the first trial, under proper instructions, ascertained liability, and in the second trial the judge ever so carefully charged the jury only that the defendant had been found liable for certain acts of unlawful secondary boycott activity, and having again defined which activities were lawful and which were not, left to the jury the question which of the unlawful acts, if any, caused damage to the plaintiff, and which did not, and also the amount of the damages. We thus find the ruling of the district court as it awarded a partial new trial was not an abuse of discretion and free from exception. We are of opinion the issues in the second trial were properly separated from those in the first, and that the issues of liability and damages were not so inextricably interwoven that a new trial was required on all issues. We are further of opinion this phase of the case is controlled by those cases exemplified by *Young* v. *International Paper Co.*, and *Mason* v. *Mathiasen Tanker Industries, Inc.*

The union's final contention that the second jury was improperly instructed is likewise without merit. It complains that the district judge only instructed the jury that the activity of the union at certain of the plaintiff's customers, and as to certain of such customers' employees, had been found to be unlawful. This instruction, as we have before mentioned, was proper, and indeed could only have been favorable to the defendant, for the plaintiff took the position and offered evidence which tended to show that all its damages claimed in the second trial were caused by the unlawful activities of the defendant as distinguished from the lawful. The defendant had every opportunity, in the second trial as at the first, to contest both the proximate cause of the damage as well as its amount, and yet offered no evidence. The fact that the trial tactics did not succeed may not be laid to the district judge, whose every act complained of was free from exception.

Accordingly, the judgment of the district court is *Affirmed.*

APPENDIX F

Judgment of Court of Appeals (January 21, 1975)

UNITED STATES COURT OF APPEALS

FOR THE

FOURTH CIRCUIT

No. 73-2393

GREAT COASTAL EXPRESS, INC.,

Appellee,

VS.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, an unincorporated association,

Appellants.

APPEAL FROM the United States District Court for the Eastern District of Virginia.

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

/s/ WILLIAM K. SLATE, II
Clerk

FILED
JAN 21, 1975
WILLIAM K. SLATE, II
Clerk

APPENDIX G

Order of Court of Appeals Denying Petition for Rehearing (November 14, 1975)

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 73-2393

No. 73-2448

GREAT COASTAL EXPRESS, INC.,

Plaintiff-Appellee-Cross Appellant,

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, an unincorporated association,

Defendant-Appellant-Cross Appellee.

ORDER

Upon the petition for rehearing en banc, no member of the court in regular active service has requested a poll of the court to reconsider the case en banc.

We have considered the petition for rehearing and are of opinion it is without merit.

In our consideration of the petition for rehearing, we note the issue that whether or not the International was properly chargeable with actions which may, in some instances, have been committed by officers or members of the Local was submitted to the jury, as a matter of fact, among other instructions which included the following:

"In short, in order to hold the International liable for acts committed by members of Local 592 you must find either, one, that the International participated in the illegal secondary activity in that the persons involved were not only subject to its control with respect to the activities and the manner of performing them, but also the activities were done while on the business of the International or for its benefit; or two, that the International ratified any illegal actions in that the International knew that such illegal secondary activity occurred and either took action which showed an intent to avail itself of the benefits of the illegal acts, or took no action under circumstances such as would make it the duty of the International to repudiate the acts. Thus the burden is on Great Coastal to prove that if any member of Local who may have committed unlawful secondary activity did so on behalf of the International."

The petition for rehearing is denied.

With the concurrences of Judge Russell and Judge Field.

/s/ H. E. WIDENER, JR.
H. E. Widener, Jr.
For the Court

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-1371

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Petitioner

vs.

GREAT COASTAL EXPRESS, INC.

Respondent

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Fourth Circuit

BRIEF FOR GREAT COASTAL EXPRESS, INC. IN OPPOSITION TO PETITION

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On Petition For A Writ Of Certiorari To The
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For The Fourth Circuit

BRIEF FOR GREAT COASTAL EXPRESS, INC. IN OPPOSITION TO PETITION

REASONS WHY A WRIT OF CERTIORARI SHOULD NOT BE ISSUED IN THIS CASE

I. The Uncontested Factual Background

A. The Petition Purposefully Avoids Bringing To The Court's Attention Crucial Facts That Were Determinative Of The Issues Presented In The Courts Below, And Accordingly, Creates Only A Fictitious "Question" For Consideration Here

The Court of Appeals decision which the Union wishes this Court to review involved nothing more than the

application of well-established principles of law to an uncontested set of facts.

The Union's efforts to secure from this Court a review of that decision is not, in reality, based upon the grounds enumerated at various points in its Petition. Rather, this effort stems entirely from one all-pervasive circumstance, and that is: Since the Union did not, and could not, refute the crucial evidence presented at the trials below, it has adopted the tactic, at every level of this case, and in its Petition to this Court, as well, *of adamantly and persistently refusing to acknowledge the existence of these undeniable facts* and the legal consequences which inevitably and inexorably flow from them.

As a consequence of the Union's resorting to this tactic, it has not presented to the Court — indeed it does not mention — the true issue upon which the case was tried, and the Union was defeated, in the proceedings below. The Union never appealed from the adverse decision rendered in the Trial Court which held, upon the uncontested evidence, that all of the damages sustained by this Respondent resulted directly and proximately from wide-spread, persistent, and successful secondary boycotting activities with which the Union supported its strike.

Rather, on its appeal to the Court below, and in its Petition to this Court, the Union has substituted a new "issue" which never arose upon the evidence at any point in the case.

B. Statement Of The Case*

1. The Strike

The plaintiff, Great Coastal Express, Inc.,[1] is a common carrier engaged in hauling general commodity freight. The Company's business consists primarily of transporting such freight between its southern territory in Virginia, and its northern territory, which includes the State of New Jersey, New York City, portions of New York State and Connecticut and eastern Pennsylvania, including Philadelphia (88)[2].

The Company's home office and main terminal are located in Richmond where all of its over-the-road drivers are based (88). The Company's only other terminals were in Philadelphia and Jersey City.

In 1970, negotiations between the Company and the International Brotherhood of Teamsters[3] for a new collec-

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*As already noted, the Respondent takes strong exception to the Petitioner's "Statement of the Case" and to its assertion with respect to the "Questions Presented." Due to the nature of this case, however, it would not be feasible, in Respondent's view, to undertake at this point a complete restatement of the essential facts or of "questions presented." However, the following is a summary of the basic factual background which will serve to demonstrate that in truth, no real question or issue has been presented to this Court.

[1]Hereinafter called "Great Coastal" or the "Company."

[2]Undesignated references are to page numbers in the Joint Appendix filed in the Court of Appeals. References preceded by the letter "A" are to the original transcript of the first trial, and references preceded by the letter "B" are to the original transcript of the second trial.

[3]The Petitioner — hereinafter called "Teamsters" or the "Union."

tive bargaining agreement reached an impasse. The Union called a strike which commenced on August 9, 1970 (120).

Initially, for a brief period, the Union restricted its strike activities to primary picketing at the Company's terminal locations. This was totally ineffective and the Company continued to operate substantially as usual (122-128, 718-720).

At Richmond, employees and other persons seeking to transact business with the Company willingly crossed the Union's picket line. In its northern territories, the Company instituted the practice of making direct pickups and deliveries, thereby making unnecessary any substantial use of the picketed Jersey City terminal (119-121, 124, A.106-107). At all of the terminals, the Union had ample opportunity to advertise its dispute to all persons entering and leaving the terminal property (128-129).

Immediately upon realizing that the primary pickets were unable to halt or curtail the Company's operations, the Union proceeded to employ ambulatory pickets to rove throughout the Company's territory, following its trucks to the secondary business locations of Company customers. The Teamsters put William A. Hodson, the President of the Richmond Local, in direct charge of the strike and the roving pickets (A.600).

These pickets were divided into teams and stationed at locations along the routes between Virginia and New York. A fund was maintained by the Union to finance them. Usually, Company trucks proceeding from Virginia to the Company's northern territory were picked up and followed by these pickets (393, 413-414). In other cases, the Union

secured information from unknown sources as to the destination of Great Coastal trucks, and the roving pickets proceeded directly to those points and waited for their arrival (235, 305).

At both trials below, it was established without contradiction — and without challenge by the Union — that, throughout the entire eight-month strike, virtually all trucks attempting to pick up or deliver in the northern territory were followed or met by ambulatory pickets (237, 279, 576, 578, 532-583, 585, 587-593, 602, 720, 731-735).

This effort by the Union proved very successful. At nearly every location in the northern territory to which Company drivers were followed by roving pickets, the employees of secondary employers immediately stopped working, or refused to handle Great Coastal freight, or both. The result was that, on hundreds of occasions, north-bound freight had to be hauled back to Richmond because it could not be delivered (734-735, 744-745, 807, 812-813).

The fact that this pervasive ambulatory picketing virtually closed Great Coastal's business remains uncontested.

Furthermore, the Company presented proof that all of the damages it suffered during the strike resulted proximately and directly from the Union's ambulatory picketing and that no such damages resulted from primary strike activities by the Union (718-721, 731, 740, 743-744, 763-764, 777-778, 789-790, 810-813). Although the Union had access to all of the Company's records for months before the trial, again it offered — and could offer — no evidence to contradict the Company's proof on that subject.

2. The Unlawful Purpose And Objective Of The Union's Ambulatory Picketing

There being no conflict in the evidence regarding these matters, the only question left for resolution in the District Court trials was this: — Did the Union through its ambulatory pickets purposefully induce or encourage employees of Great Coastal's customers to engage in strikes or refusals in the course of their employment to handle Great Coastal's freight with *an* object of forcing or requiring those customers to cease doing business with Great Coastal? Labor Management Relations Act, as amended, 29 U.S.C. §158(b)(4)(i)(B).

The Union did not introduce any evidence on that subject either. Instead, it elected to stand on the mere argument that its ambulatory picketing was legal and protected by virtue of the decision of the National Labor Relations Board in *Moore Dry Dock Co.*, 92 NLRB 547 (1950). From the very outset of this case, the Union has steadfastly refused to recognize the limited scope and true meaning of *Moore Dry Dock*, and has proceeded on the assumption that the "standards" enumerated in that decision constitute substantive law authorizing ambulatory picketing, *regardless of its purpose*, as long as the "standards" are observed.

In this the Union is seriously in error. Through a long series of Board and Court decisions,[1] it has been made perfectly clear that in *Moore Dry Dock*, the Board merely

[1]Illustrative cases are cited and reviewed later in this Brief.

undertook to set forth several criteria — sometimes referred to as "guidelines" or procedural "standards" — to be used as an aid in analyzing circumstantial evidence to determine whether the ambulatory picketing in a particular case did or did not have an unlawful purpose or object.

In the present case, however, both the Court and the juries below were spared the task of reviewing and weighing circumstantial evidence to ascertain this Union's purpose. The unlawfulness of the Union's purpose and object was firmly established not only by massive proof offered by Great Coastal without contradiction or contest, but also by unequivocal admissions and corroboration by the Union's own witnesses and documentation. Hence, *Moore Dry Dock* has never had any relevance to this case.

In presenting its case-in-chief at the first trial, the plaintiff had no means of knowing just what the Union's defense might be. The plaintiff, therefore, called some of its drivers and customers as witnesses to prove the scope, purpose and effect of the Union's ambulatory picketing. These witnesses testified to hundreds of incidents where they had been thwarted in making pickups and deliveries, including eight specific cases where they overheard direct, explicit appeals by Union representatives to secondary employees to refuse to handle Great Coastal's freight (Pet. pp. 4-5, 167-168, 195-198, 231-233, 249-250, 265-266, 282-283, 331-334).

All of this testimony proved to be unnecessary, or at least only cumulative, when the Union called its one witness, Union President Hodson. A composite of Hodson's

admissions on cross-examination, and the other evidence which corroborated him, established beyond any doubt that the Union's picketing was massive in its scope and effect, and its purpose was unlawful in its entirety.

In regard to the scope of the picketing, Hodson confirmed, as has been noted above, that "there was so much of it . . . we would follow the truck from the time it left the terminal until it reached its destination . . . and we would establish a picket line outside the gate where the truck went in and picket from the time the truck arrived until it left" (393). He also conceded that the Union "had pickets following Great Coastal's trucks throughout its system . . . over a period of eight months with some little bit of time out" (413).

It is most important to note that Hodson admitted the Union's ambulatory picketing was not "worthwhile" or "effective" unless it induced employees of secondary employers to engage in work stoppages and refusals to handle Great Coastal's freight (423-424, 435-437, 875-885). He emphasized that such picketing would be "effective" only if employees of Great Coastal's customers would "respect" the picket lines by refusing to work and refusing to load and unload Great Coastal's trucks while the pickets were present (423-424, 435-437, 875-885). Accordingly, throughout his cross-examination, Hodson repeatedly admitted that it was the Union's purpose to make the ambulatory picketing successful by securing the respect and cooperation of secondary employees.

3. The Union's Unlawful Direct Appeals And Orders To Secondary Persons

Various Union officials, up to the very top levels of authority, assisted Hodson in securing the "respect" for ambulatory picket lines which was necessary to choke off Great Coastal's business completely. Detailed plans were made and put into effect for efficient operation of the pickets.

The Union obtained and circulated among Union representatives throughout Great Coastal's system, a list of its customers (587-592, P. Ex.[1] 58). It mailed to these customers what is known in the trucking industry as a "hot cargo" letter (131-135, 937, P. Ex. 90). The uncontradicted testimony established that this letter is a continuation of the Teamsters' long-standing "hot cargo" policy and that persons who receive such a letter can expect labor trouble if they do business with the struck company (96-98, 313-316).

On September 28, 1970, Hodson wired Frank E. Fitzsimmons, Acting President of the International Union, notifying him that the ambulatory pickets were being removed (580, 868, P. Ex. 52). This was followed by an explanatory letter on the same day wherein Hodson advised the International Union that "As you may or may not know, the ambulatory pickets are not effective unless we get cooperation from the other unions that represent the people where the deliveries are being made" (582-583, 868, P. Ex. 54). In that letter, he further advised that "the

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[1]Plaintiff's exhibits.

local union is still willing to maintain the ambulatory pickets as soon as we get enough cooperation so that they will be effective." The ambulatory picketing was immediately resumed (576, 578, 582-583, 585, 587-593, 602, 891-892).

In September, Hodson orally complained to the International Director, Joseph Trerotola, that the picketing was not effective because he still was not receiving the cooperation he desired from Teamster locals who represented employees of Great Coastal's customers (434-435, 892-893). Therefore, on October 28, 1970, Trerotola wrote all of the hundreds of Teamster locals under the jurisdiction of its Joint Councils 16, 53, 73 and 83, advising them that Great Coastal was being struck because, after having been a party to the Union's National Master Freight Agreement, it had "attempted to withdraw and negotiate separately" (433, 491, 511, 587-592). Trerotola continued:

> "I am enclosing a list of the companies who are doing business with this Employer, even though there is a strike in progress which is now more than two months old. Local 592 has had pickets following the trucks and picketing has not been entirely successful because of the manner in which the Employer is operating. With your assistance it may be possible to resolve this dispute in the near future" (587-592, 868, P. Ex. 58).

In his deposition which was introduced into evidence at both trials, Trerotola as much as admitted that his request for "assistance" meant that the locals were to see that

their members "respected" the roving pickets by engaging in work stoppages while they (the pickets) were present (508-509, 517-518, 870-871).

In his weekly report to the International Union on November 2, 1970, the Secretary-Treasurer of Local 592 advised that "the picket captains on roving pickets advise me they are getting cooperation from Local 107, but are not receiving any support from Local 641" (593, 868, P. Ex. 59).

As an additional step to involve secondary employees in the strike, Hodson, pursuant to Trerotola's request, forwarded Great Coastal's customer list to John Mongello, business representative of District 65, Pulp and Sulfide Workers in New York, and asked Mongello for "any assistance you can give" (601, 868, P. Ex. 71).

On February 19, 1971, Hodson wrote Trerotola, with copies to Fitzsimmons, naming a number of Teamster locals which represented employees of Great Coastal's consignees. He also named locals of other unions who represented some of these employees (868, P. Ex. 74). Hodson then added:

> ". . . We are following Great Coastal's trucks from Richmond into the Philadelphia, New Jersey, and New York areas, and picketing the trucks when they attempt to make deliveries. However, the majority of the Local Unions claim they are unaware of our strike and refuse to respect our picket lines. If we had someone acting as a coordinator who could contact the various Unions since we usually know in advance where the loads are

going and the approximate delivery times, we feel this would be very helpful" (605).

Hodson admitted that the purpose of this letter was to report to Trerotola that the majority of Great Coastal's northern customers were unionized and that he wanted Trerotola to help "see that these local Unions did get in line and respect [the] picket lines" (426). He added, "If they respected the picket line they wouldn't be working" (426).

It is clear that the Union was not satisfied with shutting down the plaintiff's business by appeals from ambulatory pickets to secondary employees which was accomplished at some considerable expense to the Union. The purpose of all of these direct appeals to secondary employees was summarized in Hodson's admission that with such appeals he was trying to get cooperation "through other local unions" so that Great Coastal's freight "would be shut off without the [expense of] roving pickets" (444-445, 886).

With the "cooperation" and "respect" which it received from secondary employees, pursuant to the foregoing coordinated efforts, the Union achieved its announced goal of a "completely effective" strike against Great Coastal. Freight moving to and from the Company's crucially important northern territory was virtually shut off (126, 734-735). Revenues from large bulk customers, who did many thousands of dollars in business each month prior to the strike, and who attempted to do so after the strike began, dwindled to zero once the "assistance" called for by Trerotola began having its effect (848-865).

The evidence, which came from the Union's files and from the mouths of its own officials, was so overwhelming that, at the trials, the Union could say little or nothing to rebut or explain it. At neither trial was the Union able to offer a shred of evidence to justify the directives and orders from top International Union officials, channeled through hundreds of locals, to thousands of secondary employees, requiring them to "respect" the ambulatory pickets and to "cooperate" with them by striking and refusing to handle Great Coastal freight in their presence.

At the first trial, the Union responded to the description of the activities of its ambulatory pickets with the irrelevant claim that, in effect, the pickets had been *instructed* to comply with *Moore Dry Dock* standards.

By all of this, it has been proved that, in regard to liability, the first jury was never presented with a close question, the outcome of which might conceivably have been influenced by the evidence on violence that the Trial Court excluded from consideration. Indeed, that jury had no real choice in the matter. Under the circumstances, if it had found in favor of the defendant on the liability issue, most assuredly the Trial Court would have been bound to set that finding aside, to avoid reversible error.

In its Petition, the Union goes to great extremes in attempting to create the impression that the second jury did not have the benefit of any evidence relied upon by the first jury in finding the Union guilty of misconduct. This fiction was advanced for the purpose of manufacturing a factual basis for the Union's tediously elaborate argu-

ment that the second jury could not have found a causal connection between the unlawful activities and the damages it awarded.

The truth is, however, that at the second trial, the jury had before it all the evidence that was before the first jury concerning liability and proximate cause; only the *form* of the evidence was different.

Understandably, at the second trial, the Union did not put Hodson on the stand; therefore, the plaintiff called him as an adverse witness (873-909). Hodson again admitted that the ambulatory picketing which persisted throughout the Company's system for eight months, aided by other forms of appeals to secondary employees, had the purpose and effect of shutting off the Company's freight. In light of that, it would have been a useless cumulation of evidence, and a waste of court time, to call individual drivers and customers to repeat their experiences at customers' places of business.

With that exception, as the Joint Appendix shows, all liability and damage evidence was readmitted and presented to the jury at the second trial — including the boycott directives of Union officials and the uncontested evidence that all Company damages flowed directly from secondary boycotting and that none resulted from primary picketing (868, 876, B. 226, B. 271, B. 275).

Upon this state of the record, the second jury also was bound to find, as it did, that massive secondary boycotting occurred and did, indeed, directly and proximately cause extensive damages to the plaintiff's business.

On the surface, it may well seem surprising that the Union could have defaulted so completely in presenting any defense to the proof that unlawful activities destroyed the plaintiff's business. However, the reason for this default is that it was the Union's primary defense, steadfastly maintained until it reached this Court, that there was insufficient evidence of agency to hold the International Union liable for the conduct of the active participants in the unlawful activities. Indeed, the Union made no serious contention either that the acts did not occur, or that they did not wreak severe damage on the plaintiff.

In its appeal to the Court below, the Union's primary defense remained that there was no sufficient showing of agency to hold the International liable.[1] After the Union lost its appeal, the case took a bizarre turn. The agency argument has been abandoned completely.

To support all of its remaining arguments, the Union has now resurrected its misconceived and thoroughly discredited proposition that, because ambulatory pickets were *instructed* to comply with *Moore Dry Dock* standards, all roving picketing not coupled with explicit appeals or threats to secondary employees was automatically lawful (Pet., pp. 4-5).

It is an undeniable fact, therefore, that the Union is appealing to this Court with respect to an "issue" upon which it defaulted and lost at the trial level — an "issue"

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[1]The argument which is now made to this Court in the Union's Petition was added in that appeal, but was little more than "makeweight."

with regard to which it never appealed before this time. To disguise all this, the Petitioner has resorted to an inexcusable sleight-of-hand. The Union merely alludes in passing to *Moore Dry Dock* and then pretends that the doctrine made *it* the victor in the Trial Court and the Court of Appeals, not only as to the ambulatory picketing itself, but also as to direct boycotting orders and "hot cargo" letters as well.

The preposterous nature of this maneuver is clearly apparent from the face of the record, but it is squarely upon the basis of it that the Union feels free to assert and reassert to this Court, without explanation or qualification, that there was evidence below of only "eight" instances of "possible" violations of the Act.

II. Argument

A. Upon Consideration Of All The Relevant Facts, The Decision Reached By The Court Below Was Mandated By Well-Established Principles Of Law

Clearly, the method used by a union to induce or encourage secondary employees to engage in boycotting activity is absolutely immaterial to the question of legality.

> "To exempt peaceful picketing from the condemnation of §8(b)4(A) as a means of bringing about a secondary boycott is contrary to the language and purpose of that section. The words 'induce and encourage' are

> broad enough to include in them every form of influence and persuasion. . . ."
>
> *International Brotherhood of Electrical Workers, Local 501 v. National Labor Relations Board,* 341 U.S. 694, 701 (1951)

The orders from top Union officials to thousands of secondary employees requiring them to engage in strike activities were obviously and blatantly violative of the Act. 29 U.S.C. §158(b)(4)(i)(B). Certainly, also, the "hot cargo" letters sent by the Union to Great Coastal's customers were, under the evidence already described, additional violations. 29 U.S.C. §158(b)(4)(ii)(B). And, nothing could be clearer than that appeals made through ambulatory pickets are not exempt from the proscription of Section 8(b)(4), either by the statute or by the *Moore Dry Dock* principle.

> "Picketing may induce action of one kind or another, irrespective of the ideas which are being disseminated. . . . But the very purpose of a picket line is to exert influences, and it produces consequences, different from other modes of communication. The loyalties and responses evoked and exacted by picket lines are unlike those flowing from appeals by printed words. . . . Picketing of a neutral employee, however peaceful, is given no inherent exemption from the prohibition against secondary boycotts."
>
> *National Labor Relations Board v. Dallas General Drivers, Warehousemen & Helpers, Local No. 745,* 264 F. 2d 642, 647-648 (5th Cir. 1959)

"'[*I*]*f there is an expectation or a hope or a desire that employees of the secondary employer will be induced or encouraged to take considered action* so that the secondary employer will cease doing business with the primary employer, *then the Act bars that activity.* . . .'

"We think it clear that the jury could infer from the course of conduct which has been outlined above that there was at least 'an expectation or a hope or a desire that employees' of the other crafts engaged on these several jobs would take the action which they actually did take—that is to quit working behind the picket signs.

"It was, therefore, not error for the trial court to submit the issue to the jury whose finding is determinative of the question" (emphasis added).

Local 290, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America v. Oolite Concrete Company, 341 F. 2d 210, 212 (5th Cir. 1965)

"The question here, in simple terms is: Was the conduct of the union and the picketing which took place at the gate to the job site done with the object of forcing or requiring Jones to cease doing business with Schilling? . . . A review of the record, and especially the facts heretofore recited, discloses that the proof was sufficient to create issues for the jury."

Local 290, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, et al. v. I. E. Schilling Co., Inc., 340 F. 2d 286, 287, 289 (5th Cir. 1965)

". . . [It] is also conceded that if the union did have the purpose of forcing or coercing Gulf Coast to sever its ties with Gulf Electric, and the union's picketing was designed to accomplish that purpose, then the union's actions amounted to a secondary boycott, prohibited by Section 8(b)(4)(i) and (ii)(B) of the Act.

"The Supreme Court, and this Court, have made clear that the key factor is the *objective* of the union activity, whether it is aimed at the primary employer or whether it is also aimed at pressuring the secondary employer. N.L.R.B. v. International Rice Milling Co., 341 U.S. 665, 672, 71 S. Ct. 961, 95 L. Ed 1284 (1950); Seafarers' International Union v. N.L.R.B. [Salt Dome], 105 U.S. App. D.C. 211, 216, 265 F. 2d 585, 590 (1959). . . ."

International Brotherhood of Electrical Workers, Local 408 v. National Labor Relations Board, 413 F. 2d 1085, 1087, 1089 (D.C. Cir. 1969)

B. The Principal Defense Relied Upon By The Union Throughout The Proceedings Below Is Not Remotely Related To The Defenses Urged Upon This Court As Reasons For Review Under Writ of Certiorari

As noted earlier, the Union, throughout both jury trials and in the Court of Appeals, relied primarily upon the contention that there was insufficient evidence to hold the International Union responsible for the damages inflicted

upon Great Coastal by the secondary boycott activity. At each level, this contention was found to be without merit.[1]

In its Petition to this Court, that issue has been abandoned, and the Union now relies upon two propositions which, on the surface, appear to be separate and distinct, but, upon closer examination, will be found to stem from the same basic assumptions that have been shown in earlier portions of this brief to be wholly invalid. Accordingly, the Union has not presented to this Court any appropriate grounds for a further review of the case.

1. The Court Of Appeals Properly Found That It Was Not An Abuse Of Discretion In This Case For The Trial Court To Order A Second Trial As To The Damage Issue Without Setting Aside The Jury's Verdict On Liability

Upon defendant's motion at the conclusion of the first trial, the Court set aside the verdict in part upon a finding that the amount of damages awarded by the jury "was substantially out of touch with damages allegedly proven" (App. Pet. 6a). The Court was then faced with the question of how best to proceed with the case. After noting that there was "proper precedent under §303 for a remittitur," the Court concluded that in this case "a remand for new jury determination as to damages is appropriate" (App. Pet. 7a). Upon appeal, the actions and reasoning of the

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[1]See Appendix to Petition for Writ of Certiorari (hereinafter, "App. Pet."), pp. 2a, 3a, 4a-5a, 17a, 22a-23a.

Trial Court were carefully examined. After thorough consideration of the factual circumstances involved and of the legal principles applicable to such situations, it was found that "the ruling of the district court as it awarded a partial new trial was not an abuse of discretion" and was "free from exception" (App. Pet. 24a-30a).

None of the Union complaints concerning the second trial escaped the attention of the Court of Appeals, and each was answered by the Court upon well-reasoned analysis, and was rejected upon sound legal authority. Therefore, it would serve no useful purpose to attempt here a restatement of the Court's analysis.

However, there are certain specific assertions made on this point in the Petition as to which further observations may be appropriate by way of response.

First, the Union, relying heavily upon portions of the opinion of this Court in *Gasoline Products Company, Inc. v. Champlin Refining Company*, 283 U.S. 494 (1931), attacks the decision of the Court of Appeals upon the asserted ground that the first jury's verdict was found by the Trial Court to have been "infected" by improper considerations—specifically, evidence of strike violence which was withdrawn from jury consideration during the trial; and that the Court of Appeals should not have substituted its own speculation as to what caused the excessive damage award, but should have ordered a new trial on all issues—i.e., liability as well as damages.

In the first place, this grossly mischaracterizes what each of the Courts said and did. The Trial Court expressed the

opinion that "the jury, while well intentioned, was in spite of the Court's instructions to the contra, influenced ***in its consideration of damages*** by the gross and vicious conduct attributed to the members of the local union and their sympathizers" [emphasis added] (App. Pet. 6a).

At no point did the Court indicate an opinion that the *liability* portion of the verdict was influenced by the evidence of violence. And obviously, that was ***not*** the Court's opinion, otherwise it would not have ruled—as it did—that the verdict should stand with respect to its finding of Union liability.

Furthermore, the Court of Appeals obviously did not substitute its own speculation in place of the Trial Court's finding as to the cause of the excessive verdict, as the Petition charges (Pet. p. 14). Its view of the matter coincided with that of the Trial Court, and the criticism expressed in the Petition (at 23-24) is entirely unjustified.

Finally, on this portion of the Union's argument, it is important to note that, in light of the overwhelming and uncontradicted evidence clearly establishing Union liability, the jury had no real choice but to find in the Company's favor on this issue. As demonstrated earlier in this brief, a ruling by the Court setting the entire verdict aside would have been reversible error because, upon the basis of the evidence before the jury, the plaintiff would appear to have been entitled to a directed verdict on the liability issue. Surely, then, the ruling which the Court did make could not possibly be held to have constituted an abuse of discretion.

The Petition also relies upon the *Gasoline Products* case, and others, for its extensive argument that it was improper in this case to limit the second trial to the issue of damages because that issue could not fairly be determined "without a redetermination of the liability issue" (see, e.g., Pet. 15, 20, 28).

Although stated in a number of different ways in the Petition, the basic contention of the Union is that the evidence on the two issues is so intertwined that a jury could not properly decide one separately from the other; and, that in this case the "damage jury" (as the Petition frequently describes the second jury) did not know which specific acts of secondary boycotting the "liability jury" had found to be legal and which illegal, and therefore could not know which acts it should consider in assessing damages.

Of course, it is readily apparent that once again the ***entire*** argument is necessarily predicated upon the all-important assumption that some of the plaintiff's damages were incurred as a result of lawful strike activity, and some by admittedly unlawful secondary boycotting, and that ***no*** recovery could properly be had unless the plaintiff met its burden of proving what portions of its damages were proximately caused by particular acts of the Union shown to be violative of §8(b)(4) of the Act.

The answer to all of this, of course, has already been made abundantly clear in earlier segments of this brief. First and foremost is the unassailable fact that *all* of the plaintiff's damages were the direct and proximate result of

the Union's illegal secondary boycotting, and none was caused by permissible or protected strike activity.

Though perhaps unnecessary—since the foregoing is in itself a complete answer to the Petition's contentions on this point—the following additional facts may be noted.

First, as the record plainly shows, the second trial was not in fact limited to evidence on damages. All of the essential testimony and exhibits used at the first trial to establish beyond dispute the Union's liability for the illegal activities that caused all of plaintiff's damages was reintroduced and considered by the jury at the second trial. Therefore, the "damage jury" did have complete knowledge of the evidence upon which the first jury found liability.

Moreover, as the Court of Appeals properly observed, "at the second trial, the trial judge, out of an abundance of precaution, submitted not only the amount of damages, but also the proximate cause thereof to the jury. Thus there were the two issues tried at the second trial, not only the issue of the amount of damages" (App. Pet. 24a). To this, the Court of Appeals quite appropriately added that all of this was done with careful and complete instructions to the jury which were to the effect that it could not award any damages to the plaintiff except to the extent that the jury was satisfied from the evidence before it that "the losses resulted from illegal strike activity" (App. Pet. 24a-25a). Indeed, a reading of the full instructions to the second jury will reveal that they were far more favorable to the defendant than it was entitled to have—again, no doubt, out of an abundance of precaution on the part of the trial judge.

2. This Case Is Clearly Distinguishable From *Local 20, Teamsters Union v. Morton*, And The Petition Fails To Show That The Court Of Appeals Decision Here Is In Conflict With That Of Any Other Circuit.

Local 20, *Teamsters Union v. Morton*, 377 U.S. 252 (1964) is so obviously distinguishable from the present case that only brief comment need be made here with respect to the Petitioner's extended arguments based on that decision.

First, the District Court in *Morton* tried the case without a jury and rendered a decision which in effect constituted a special verdict. Exact, separate amounts of monetary damages were found to have resulted from strike activity conducted by the Union at the premises of several of the plaintiff's customers. The activities at some of these locations were found to be violative of §303 of the Act; activities at other locations were not, although they did violate state law. No violence was involved. The Trial Court erroneously concluded that in such a factual situation the plaintiff was "entitled to recover damages measured by all of the profits lost as a result of the petitioner's total strike activity so long as some of that activity was unlawful." 377 U.S. at 255.

In the present case, there was no such situation. No special verdict was submitted to either jury, and whether there should have been was a matter strictly within discretion of the trial judge. And, as the Court of Appeals quite properly noted, the Union went through both trials without request-

ing that the issues be submitted on a special verdict, and made no complaint about the use of the general verdict until the case was on appeal. (App. Pet. 26a).

Moreover, again it must be observed that in this case it was established that all of plaintiff's damages proximately resulted from conduct of the Union that violated the secondary boycott provisions of the Act. Under such circumstances, there is no occasion even to consider the principles for which the *Morton* case stands.

Despite its stained and tortured efforts to do so, the Union has failed in all attempts to show that the decision below is in conflict with that of any other Circuit, or with any decision of this Court. And overall, the Petition fails to present any circumstance indicating that there exists in this case any element or characteristic bringing it within that narrow range of situations which this Court considers to be justification for issuance of a writ of certiorari. (Supreme Court Rule 19.)

III. Conclusion

Upon all of the foregoing, Great Coastal Express, Inc., earnestly contends that a Writ of Certiorari should not be granted in this case.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1371

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, *Petitioner,*

v.

GREAT COASTAL EXPRESS, INC., *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY MEMORANDUM FOR PETITIONER

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REPLY MEMORANDUM FOR PETITIONER

A. THE QUESTIONS PRESENTED ARE PROPERLY HERE.

Respondent first asserts that the petition "creates only a fictitious 'question' for consideration here" (Opp. 1);[1] since Questions 1 (a) and (b) and Ques-

[1] Throughout this reply "Pet." will refer to the petition for certiorari; "App." will refer to the appendix to the petition for certiorari; and "Opp." will refer to Great Coastal's Brief in Opposition. In referring to the record in the court below, we will use the same designation as in the Petition (Pet. 3, n.*), except, of course, when quoting Respondent.

tion 2 are drawn directly from the Court of Appeals' rulings, see Pet. 12 (describing the opinion below) and our explicit discussion of that opinion throughout our argument, the questions presented are very much in this case, and cannot be wished away.[2] On the other hand, the opinion of the Court of Appeals will be searched in vain for a discussion of the well-established principles of the law"[3] or the "uncontested set of facts"[4]

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[2] Respondent also says that "[t]he argument which is now made to this Court in the Union's Petition was added in that appeal, but was little more than 'makeweight.'" (Opp. 15, n. 1. While it is jurisdictionally sufficient that the issues raised in the petition were presented and decided in the Court of Appeals, we note that each was fully briefed and argued.

Nor is there anything "bizarre" (Opp. 15) about our not raising here the issue of the International's responsibility. In denying the petition for rehearing the Court abandoned the *per se* rule which we had challenged on the appeal, and rested its affirmance on this issue instead on the Trial Court's instruction to the jury (App. 33a-34a, which is omitted from the string of references at Opp. 20, n. 1). Because we were in doubt as to whether objection to that instruction had been properly preserved, we restricted our petition in this Court to those serious errors of general importance as to which no technical objection could possibly be raised.

[3] The reference here is apparently to the "established principles" enunciated at Opp. 16-19 dealing with the scope of § 8 (b)(4)(B). The Court of Appeals' opinion does not discuss this subject at all.

What is not clear is whether by "established principles" respondent refers to the statements of law in the five cases which it quotes, and which we accept, or respondent's own statement of the law as it applies to this case (Opp. 17), which is plainly wrong. What respondent is pleased to call "the 'hot cargo' letters sent by the Union to Great Coastal's customers" (described at Pet. 4), were clearly lawful under this Court's decisions cited at Pet. 27, n. 14, and a decision by the National Labor Relations Board with respect to an almost identical letter sent out by the same local union, *Estes Express Lines*, 181 NLRB 790. The Board there held also that such a letter "by assuring the neutral employers that any such picketing would meet Moore

which, according to respondent (Opp. 1-2), the decision below involves. We therefore turn to respondent's argument with respect to the individual questions.

Dry Dock standards, and by disclaiming any intention to threaten the neutral, negates any unlawful secondary objevtive" (*Id.* at 791).

The proposition that ambulatory picketing is not necessarily lawful even if it complies with *Moore Dry Dock* standards (Opp. 17) if sound, avails respondent nothing; contrary to its assertions, we raise no *Moore Dry Dock* issue in this Court. What matters is that ambulatory picketing is not per se *illegal*, as respondent implicitly concedes. Its illegality turns on its objective, that is, whether it is to induce the secondary employees not to aid the primary employer in its day-to-day operations, here by refusing to load or unload Great Coastal's freight (legal), or to engage in a more general work stoppage (illegal). *Steelworkers* v. *Labor Board*, 376 U.S. 492, 499; *Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 386-390; *NLRB* v. *Operating Engineers*, 400 U.S. 297, 304.

[4] The reference here appears to be to the assertion at Opp. 2 which we quote and refute at pp. 6-7 *infra*. Throughout its brief respondent describes other facts or evidence as "undisputed". But given the rule of *Carrier*, and respondent's assertion that all its damages flowed from ambulatory picketing, the only material factual issue is whether it is *undisputed* that the defendants induced secondary employees to "respect" the picket lines by engaging in general work stoppages in their presence or only refrain from loading or unloading Great Coastal freight. Respondent quotes, out of context, a statement by Hodson given at the first trial: "If they respected the picket line they wouldn't be working (426)" (Opp. 12). This omits the colloquy immediately thereafter, where plaintiff's counsel clarifies the matter:

> "Q. Wouldn't be loading and unloading Great Coastal trucks? A. No, sir." (I JA 426-427)

We reproduce in Appendix A, *infra*, Hodson's testimony on this subject at the second trial in which the limited scope of the inducement is clear beyond capacity to pervert. Plaintiff's counsel himself there said:

> "If the employees, union members, who were working for Great Coastal's customers, cooperated they wouldn't load or unload, isn't that right? We have already established it once." (II JA 890)

ARGUMENT

Reply with Respect to Question I(a):

We agree that the District Judge determined only that the jury had been prejudiced in its consideration of damages, as shown by the excessive verdict. But from this determination, it followed as a matter of law, under the decisions of this Court and the other authorities cited as Pet. 19-20, that defendant was entitled to a new trial on all issues. Respondent surmises that the trial judge believed that the verdict on liability was not similarly infected. But *Gasoline Products* and the lower court cases applying that precedent establish that a partial new trial is not permissible unless there is no doubt that the jury's verdict on one issue is uninfluenced by its errors with respect to other issues. (Pet. 21-22, cf. Pet. 32) Surely, it is "a rational explanation for"[5] the action of a jury which, because of improper evidence of violence, renders an award 50% greater than the plaintiff's demand or the evidence will tolerate, that it was likewise improperly influenced in deciding that the defendant was liable, the essential pre-

[5] The phrase is that of the Fifth Circuit in an opinion of April 15, 1976, on denial of rehearing in *Jamison Co., Inc.* v. *Westvaco Corp.*, cited at Pet. 32 and quoted id. at n. 18. The Court said:

> "We cannot be certain that this account accurately represents the jury's intention in responding as it did. In order to require retrial as to all issues, however, we need only conclude that the above presents a rational explanation for the jury's action." (Fifth Circuit slip ops. 2896, 2898).

Immediately thereafter the *Jamison* opinion quoted with approval the first two sentences of the passage of the District of Columbia Circuit's opinion in *Camalier and Buckley, etc.*, quoted at Pet. 21, n. 10.

condition for its rendering of the excessive verdict. Indeed, we think the contrary assumption is a psychological absurdity which the law should not, and under our understanding of the decisions may not, indulge.

Respondent endorses the Court of Appeals' explanation of the jury's conduct, and says that its "view of the matter coincided with that of the Trial Court" (Pet. 22). Respondent points to nothing in the record to substantiate that assessment, in fact, the judge said nothing on the subject except what is at Pet. App. 6a-7a, which is qu ed at Pet. 8-9.

All else failing, respondent contends that the trial court's ruling was correct because "the plaintiff would appear to have been entitled to a directed verdict on the liability issue." (Opp. 22). The Court of Appeals' evaluation of the state of the evidence is far different:

> "We should say here, and we emphasize, that the union does not contest the fact that there was evidence from which a jury could find an illegal secondard boycott. Indeed, the matter is admitted to be clearly a jury question. And the matter having been decided in favor of the plaintiff under proper instructions, it is, in all events, removed from our consideration. *Lavender* v. *Kurn*, 327 U.S. 645 (1946)." (App. 19a)

Additionally, that Court's ruling on rehearing International's responsibility establishes that this liability issue, too, was a jury question. Defendant was entitled to have these liability issues decided by a fair-minded jury, rather than one which rendered an admittedly excessive verdict in the teeth of the Court's instructions. Since the courts below denied defendant that fundamental right, it can be vindicated, and adherence to this Court's precedents enforced, only by the exercise of this Court's reviewing authority.

Reply with Respect to Question 1(b):

Respondent says:

> "Of course, it is readily apparent that once again the *entire* argument is necessarily predicated upon the all-important assumption that some of the plaintiff's damages were incurred as a result of lawful strike activity, and some by admittedly unlawful secondary boycotting, and that *no* recovery could properly be had unless the plaintiff met its burden of proving what portions of its damages were proximately caused by particular acts of the Union shown to be violative of § 8(b)(4) of the Act." (Opp. 23, emphasis in original)

We accept the foregoing, with a single exception which we mention in the margin.[6] Great Coastal's principal response is to assert it to be an "unassailable fact that *all* of the plaintiff's damages were the direct and proximate result of the Union's illegal secondary boycotting, and none was caused by permissible or protected strike activity" (Opp. 23-24). We unqualifiedly dispute the assertion that this is a "fact".

This claim first appears at Opp. 2:

> "The Union never appealed from the adverse decision rendered in the Trial Court which held, upon the uncontested evidence, that all of the damages sustained by this Respondent resulted directly and proximately from widespread, persistent, and successful secondary boycotting activities with which the Union supported its strike."

[6] Our objection is to the phrase "were incurred". A more accurate statement of our position is that it depends on the assumption that some of the plaintiff's damages *could have been* incurred as a result of lawful strike activity. See Pet. 26-27, 29-31. That assumption is correct as a matter of law, see Pet. 27 and pp. 2-3, n.3, *supra*.

The trial court did not so hold, and respondent points to nothing in its opinion or elsewhere in the record to justify that statement. On the contrary, the District Court submitted the issue of proximate cause to the jury at the second trial, although under circumstances which made it impossible for the jury to perform that function. And even respondent does not argue that the Court of Appeals so held.

The assertion is repeated in the Statement of the Case. (Opp. 5, 14). At Opp. 5 respondent refers to various excerpts from the testimony of Great Coastal's president Estes at the second trial. For the sake of completeness we describe this testimony item by item in App. B, *infra*. The essential points, however, are 1) that Estes nowhere connects any strike activity with any loss; and 2) that Estes expressed the opinion that all his losses were caused by "secondary boycotting activities" (II JA 720), which he did not further identify. His expression of opinion, which was objected to, was not competent and the Court instructed the jury to disregard it (II JA 916). See Pet. 30, n. 15, second paragraph.

The representation that all changes flowed from "ambulatory picketing" (Opp. 5) is belied by Great Coastal's answer to interrogatories, quoted in Appendix C, *infra*, p. 6a.

Description of respondent's references at Opp. 14 is unnecessarily complicated because it has combined in a single parenthesis references to evidence on two separate subjects" boycott directives of Union officials and the uncontested evidence that all Company damages flowed directly from secondary boycotting and that none resulted from primary picketing" (*id.*). Nevertheless,

in App. C, *infra,* we describe that evidence. It suffices to say that there is nothing which connects any, much less all, of plaintiff's losses to any activity, legal or illegal.

In sum, the "unassailable fact" (Opp. 23) is not a fact at all.

In response to Question 1(b) Great Coastal tenders two additional points. The first is that all the liability evidence was also presented to the damage jury, which therefore "did have complete knowledge of the evidence upon which the first jury found liability" (Opp. 24). The short answer is that the damage jury did not have knowledge of what incident or incidents the first jury based its liability finding. A somewhat longer and likewise conclusive answer is that there was nothing that the damage jury could usefully do with that evidence, or the knowledge that it had been before the first jury. The damage jury could not determine for itself which, if any of the strike activities were illegal, for it was not instructed to do so, nor given any basis for separating licit from the illicit. It was instructed only that it was to accept as given the union's liability for action with "certain" of Great Coastal's customers. (Pet. 10, 29-30). Nor, if it had been instructed to assess that evidence independently—that is, if it had been directed to redetermine liability—could the jury have taken the necessary next step under *Morton,* to determine which acts proximately caused loss to the plaintiff, for plaintiff steadfastly refused to introduce any evidence linking particular actions to its losses. See also Pet. 30-31.

Respondent also emphasizes the Court of Appeals' approval of the trial court's instructions. (Opp. 24) On this point we rest on the discussion at Pet. 30, n. 15.

Reply with Report to Question 2:

First, respondent seeks to distinguish *Teamsters Union* v. *Morton,* 377 U.S. 252, on the ground that that case was tried to the Court, whose decision, according to respondent, in effect constituted a special verdict; whereas the present case was tried to a jury and no special verdict was sought. We are quite at a loss to understand what this difference in procedure has to do with the holding of *Morton* that in a suit under § 303 the plaintiff may only recover those losses which he proves were proximately caused by a violation of § 8(b)(4), on which the decision below engrafted a devitalizing exception by a misapplication of *Story-Bigelow* (see Pet. 30-41). It is apparently Great Coastal's submission that it was relieved of the burden of proof because the defendant union did not move for a special verdict. We agree that because of the limited retrial and also because of plaintiff's strategy, to show only its total strike losses, that has been the effect of the decision below; but we emphatically dispute that this is permissible under *Morton.*

Respondent's only other argument on this point is to again observe "that in this case it was established that all of plaintiff's damages proximately resulted from conduct of the Union that violated the secondary boycott provisions of the Act" (Opp. 26). As we have felt compelled to demonstrate at perhaps excessive length, that proposition was not "established". Respondent's tireless repetition does not make it so.[7]

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[7] In a decision reported after the Petition was filed, *Fleming Building Co., Inc* v. *Northern Oklahoma Building & Trades Council,* 91 LRRM 2794, the Tenth Circuit has joined the Second, Fifth & Ninth (see Pet. 39-40) in holding that the plaintiff in a § 303 suit must "establish the existence of damages by a preponderance of the evidence" (*id.* at 2795).

CONCLUSION

For the reasons stated in the petition and herein, the Petition for Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

Excerpt from Transcript of Second Trial Regarding the Object of Defendants' Ambulatory Picketing [II JA 890-891]

Q. [Mr. Alexander, Plaintiff's counsel] Mr. Hodson, I want to know, the question was this, that if they were—if these employees of Great Coastal customers were respecting your picket line, they would not be loading and unloading Great Coastal freight, would they?

A. Naturally, they wouldn't.

Q. Would not?

A. Would not.

Q. And when your roving pickets went there, they went there knowing this, didn't they?

MR. DICKSTEIN: Objection. This witness doesn't know the state of mind of anyone else.

MR. ALEXANDER: All right. I will withdraw that one.

BY MR. ALEXANDER:

Q. You said to Mr. Trerotola, if the employees of Great Coastal's customers were cooperating they would stop loading Great Coastal freight, isn't that right?

A. Employers?

Q. Employees.

A. Employees.

Q. Employees.

A. If the employers were cooperating, they wouldn't.

Q. See, Mr. Hodson, I haven't said a word about employers and I am not interested in employers. I am interested in these things here.

If the employees, union members, who were working for Great Coastal's customers, cooperated they wouldn't load or unload, isn't that right? We have already established it once.

A. If they respect the picket line, they would not.

APPENDIX B

Summary of Testimony of C. E. Estes Cited at p. 5 of Brief in Opposition

At II JA 718-721 Estes testified that there was no time during the strike that drivers would not cross the picket line at Richmond to drive Great Coastal's trucks; that the drivers did other work than driving during the strike; that Great Coastal obtained an intrastate contract hauling permit from the State: and that it would continue to pick up freight in the Virginia area. He was also permitted to testify as follows:

> "Q. Do you know of any reason for any change in your operations during the strike other than the secondary boycotting activity?
>
> MR. DICKSTEIN: Objection.
>
> THE COURT: Overruled.
>
> THE WITNESSS No, sir. We could have operated, handled every customer we had and were doing it." (II JA 720)*

At II JA 731 Estes testified that during the strike he had freight which he could not deliver but had to bring back. At II JA 732 the Court overruled defendant's objection that the testimony had not been connected with secondary boycott activity. No such connection was subsequently made.

At II JA 740 Estes testified that Great Coastal was handling local cartage in Richmond during the strike and that local cartage was also being handled in New Jersey.

At II JA 743-744 Estes testified that the reason that there were only two north-bound shipments in October 1970 during the strike was that Great Coastal had to restrict the number of stops on a trailer because the drivers were

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* The jury was instructed to disregard this testimony. II JA 916.

"trying to shake these pickets so they * * * wouldn't shut off the delivery when we went to our custombers". He also stated: "If we had been picketed legally, we could have hauled all the freight we were handling before." He also said: "We had cartage agents up there willing to deliver any freight we brought to them if we could keep the illegal picketing away" and that "[t]here was no reason to take freight that was going to sit on our lot and illegal picketing could keep us from delivering it." (*Id.*)

At II JA 763-764 Estes testified: "We picked up all the calls that we could pick up that the pickets would not—weren't harassing us and allowing them to load it." II JA 763. He denied that he was seeking to recover damages for all the business lost during the strike but only those "that were inflicted by the illegal strike" (*id.*). He opined further that "[o]ur business was destroyed by violence and illegal picketing." (II JA 763-764).

At II JA 777-778 Estes stated that because of the picketing, Great Coastal lost the business of Rochester Button which went to a competitor and did not return to Great Coastal after the strike (II JA 777). He also stated that the pickets followed Great Coastal's trucks wherever they went (II JA 778).

At II JA 789-790 Estes testified to Great Coastal's savings because it was not necessary to use the Jersey City terminal as he had been required under the prior Union agreement. He also testified that it was his belief that his customers were "coerced into not doing business" with Great Coastal (II JA 789-790). However, when Estes attempted to explain what he meant by "coerced" the Court sustained an objection to such explanation on the ground that the testimony was not based on Estes' personal knowledge. (II JA 790-791).

Estes' testimony at II JA 810-813 involves situations where Great Coastal first attempted unsuccessfully to make

deliveries, brought the cargo back, and ultimately affected delivery. Estes stated that he did not keep a record of these incidents because "[n]obody asked for it, so why go to the cost and expense?" (II JA 810). He denied the reshipments and stated that "they would be reflected in our operating ratio". He was unable to identify a specific incident in which this occurred, even with the single company that he named (Chesapeake) because there were "so many of them" (II JA 811-813).

APPENDIX C

Summary of Testimony and Exhibits Referred to at Opp. 14

For convenience we reproduce respondent's assertion:

> "With that exception, as the Joint Appendix shows, all liability and damage evidence was readmitted and presented to the jury at the second trial—including the boycott directives of Union officials and the uncontested evidence that all Company damages flowed directly from secondary boycotting and that none resulted from primary picketing (868, 876, B. 226, B. 271, B. 275)." (Opp. 14)

Of these references there is testimony only at 876; it refers to "the boycott directives of union officials".

At 868 plaintiff introduced eight exhibits, and its own answers to certain interrogatories. Those exhibits which fit either of the categories, relate only to the "boycott directives". The answers to the interrogatories are identical, each drawing attention to an attached report of the accountants Ross, Lybrand and Montgomery; Those accounting records, of course, show nothing about the *cause* of the losses which they reflect.

B. 271 is reproduced at 868; this reference is therefore duplicative. At B. 226 respondent introduced Exhibit Nos. 104a, 104b, 110 and 111. The 104 Exhibits are working papers of Mr. Lepp, plaintiff's accounting witness who acknowledged that he did not know the cause of any losses (II JA 846, 847, quoted as Pet. 9). Exhibits 110-111 were charts showing Great Coastal's net profit and loss; they do not show whether any losses were caused by legal or illegal activity.

At B. 75 respondent introduced Exhibits 108, 109, 112 and 113. Exhibits 108 and 109 were plaintiff's answers to interrogatories. We do not know to which of its answers respondent invites the Court's attention, but none w

evidence that all damages (or any) flowed from secondary boycotting. Indeed, in answer to Interrogatory 13(d) respondent said in part:

> "In most cases, customers reacted to union letters, oral appeals and roving pickets by ceasing to ship or receive freight from the plaintiff, but without expressly notifying the plaintiff that they were ceasing to do business with it."

Exhibits 112 and 113 are the tonnage and revenue reports for 1970 and 1971 respectively. These show a causal relationship between the strike and plaintiff's loss of revenue, but not between illegal strike activities and that loss, as respondent alleges.